BLACK, J.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM [redacted] 1961

No. [redacted] 66

ISADORE BLAU, ETC., PETITIONER,

vs.

ROBERT LEHMAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 14, 1961
CERTIORARI GRANTED APRIL 24, 1961

Index.

TESTIMONY.

WITNESSES FOR PLAINTIFF:

EXHIBITS.

DEFENDANTS' EXHIBITS:

United States Court of Appeals

FOR THE SECOND CIRCUIT.

ISADORE BLAU, a stockholder of Tide Water Associated Oil Company, suing on behalf of himself and all other stockholders similarly situated and on behalf of and in the right of Tide Water Associated Oil Company,

Plaintiff-Appellant-Appellee,

against

ROBERT LEHMAN, ALLAN S. LEHMAN, JOHN HERTZ, JOHN M. HANCOCK, MONROE C. GUTMAN, PAUL M. MAZUR, WILLIAM J. HAMMERSLOUGH, FRANCIS A. CALLERY, FREDERICK L. EHRMAN, JOHN R. FELL, WILLIAM S. GLAZIER, PHILIP H. ISLES, HERMAN H. KAHN, EDWIN L. KENNEDY, FRANK J. MANHEIM, PAUL E. MANHEIM, MORRIS NATELSON, HAROLD J. SZOLD, JOSEPH A. THOMAS, a co-partnership, doing business under the firm name and style of LEHMAN BROTHERS,

Defendants-Appellees,

JOSEPH A. THOMAS,

Defendant-Appellee-Appellant,

and

TIDE WATER ASSOCIATED OIL COMPANY,

Defendant-Appellee.

Statement Under Rule 15(b).

The following are the material entries in the case:

1955

Sept. 14 Filed complaint and issued summons.
Sept. 22 Filed summons and Return.

Statement Under Rule 15(b)

Oct.	3	Filed answer of Tide Water Assoc. Oil Co.
Nov.	15	Filed answer of defendants other than Tide Water.
1956		
May	22	Filed Stip. and Order substituting Hecht, Hadfield, Farbach & McAlpin in place of Leve, Hecht, Hadfield & McAlpin as attorneys for defendant, Tide Water Associated Oil Co.
1957		
Oct.	22	Filed plaintiff's Notice to Admit.
Nov.	6	Filed Stip. and Order that defendants, Lehman Bros. responses to items contained in Notice to Admit shall not be deemed a waiver, etc.
Nov.	15	Filed responses of defendants Lehman Bros. to plaintiff's Notice to Admit
1958		
Jan.	20	Filed Note of Issue for Trial.
1959		
Apr.	27	Before Dawson, J. Trial begun.
Apr.	28	Trial continued and concluded. Decision reserved.
May	25	Filed transcript of record proceedings of April 27, 28, 1959.
May	25	Filed Opinion No. 25, 158. Court decrees that Thomas is accountable to Tide Water for his proportionate share of profits of Lehman Bros. in the short-swing transactions in Tide Water stock. If parties cannot agree on figure, it will be necessary to refer this item of damages to a Special Master to take and state account.

Statement Under Rule 15(b)

June	25	Filed Order and Judgment that defendant, Tide Water have judgment against defendant, Joseph A. Thomas, for sum of $3,893.41, together with costs in sum of $297.40. Action dismissed as to all other defendants. Dawson, J.
July	16	Filed plaintiff's Notice of Appeal.
July	22	Filed Notice of Cross-Appeal by defendant, Thomas.
Aug.	24	Filed notice of certification of appeal record to USCA.

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Complaint.

Plaintiff, by Morris J. Levy, his attorney, complaining of the defendants, respectfully alleges as follows:

FIRST: Plaintiff is the owner and holder of shares of common stock of Tide Water Associated Oil Company (hereinafter referred to as "Tide Water") and brings this action on behalf of himself and all other stockholders similarly situated and on behalf of and in the right of Tide Water.

SECOND: Jurisdiction of this action is conferred upon this Court and arises under the provisions of Sections 16(b) and 27 of the Securities Exchange Act of 1934, 15 U.S.C.A. Sections 78p(b) and 78aa, and other relevant sections. This action is not a collusive one to confer jurisdiction of a cause upon a court of the United States of which it would not otherwise have cognizance.

THIRD: The sum or amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00.

FOURTH: Upon information and belief that the defendant, [199] Tide Water, is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and has a principal place of business located in the Borough of Manhattan, City and State of New York.

FIFTH: Upon information and belief that at all the times hereinafter mentioned Tide Water's equity securities were duly registered on the New York Stock Exchange, a National Securities Exchange, and were not and still are not exempted securities.

SIXTH: Upon information and belief that at all the times hereinafter mentioned the defendants, Robert Lehman, Allan S. Lehman, John Hertz, John M. Hancock, Monroe C. Gutman, Paul M. Mazur, William J. Hammerslough, Francis A. Callery, Frederick L. Ehrman, John R. Fell, William S. Glazier, Philip H. Isles, Herman H.

Kahn, Edwin L. Kennedy, Frank J. Manheim, Paul E. Manheim, Morris Natelson, Harold J. Szold and Joseph A. Thomas were co-partners, doing business under the firm name and style of Lehman Brothers, and will hereinafter collectively be referred to as "Lehman Brothers".

SEVENTH: Upon information and belief that at all the times hereinafter mentioned the defendant, Joseph A. Thomas, was a director of Tide Water and was also a partner in the defendant firm of Lehman Brothers.

EIGHTH: Upon information and belief that at all the times hereinafter mentioned the defendants, Lehman Brothers, deputed the defendant, Joseph A. Thomas, to represent its interests as a director on the Tide Water Board of Directors, and that at all the times hereinafter mentioned the said defendant, Joseph A. Thomas, did represent the interests of the Lehman Brothers firm on the Tide Water Board of Directors.

NINTH: Upon information and belief that between on or about December 8, 1954 and March 8, 1955, a period of less than six months, the defendant, Joseph A. Thomas, by reason of his special and inside knowledge of the affairs of Tide [200] Water, advised and caused the defendants, Lehman Brothers, to purchase and sell 50,000 shares of the $1.20 Cumulative Preferred stock of Tide Water, realizing profits thereon which did not inure to and was not recovered by Tide Water.

TENTH: Upon information and belief that the aforesaid equity securities were not acquired by defendants, Lehman Brothers or Joseph A. Thomas, in connection with any debt previously contracted.

ELEVENTH: Upon information and belief that the acts or transactions constituting the violations of the provisions of Section 16(b) of the Securities Exchange Act of 1934, herein complained of, occurred on the New York Stock Exchange, located within the territorial lim-

its of the Southern District of New York and within the jurisdiction of the Southern District Court for the Southern District of New York.

TWELFTH: That prior to the commencement of this action and on June 29, 1955, plaintiff's attorney sent a letter to Tide Water setting forth the facts contained in this complaint and demanding that Tide Water institute suit against the defendants, Lehman Brothers and Joseph A. Thomas, to recover the profits realized by Lehman Brothers' "short-swing" transactions in Tide Water's stock. That although more than sixty (60) days have elapsed since the demand was made upon Tide Water to institute such suit, but Tide Water has failed and refused to commence such suit pursuant to the aforementioned request.

WHEREFORE, plaintiff respectfully demands judgment against the defendants, as follows:

1. That the defendants, Lehman Brothers and Joseph A. Thomas, jointly and severally account to defendant, Tide Water, for all profits realized by reason of Lehman Brothers' "short-swing" transactions in Tide Water's stock as hereinabove alleged and directing the said defendants, Lehman Brothers and Joseph A. Thomas, to pay over the amount of such [201] profits with interest.

2. That plaintiff be allowed the costs and disbursements of this action including a reasonable fee for his attorney.

3. That plaintiff have such other and further relief as this Court may deem proper.

MORRIS J. LEVY
Attorney for Plaintiff

(Verified by Isadore Blau, September 10, 1955.)

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Answer.

Defendants other than Tide Water Associated Oil Company, by their attorneys Simpson Thacher & Bartlett, for their answer to the complaint herein:

1. Deny any knowledge or information thereof sufficient to form a belief as to the truth of any of the allegations contained in paragraphs "First", "Second" and "Third" of the complaint.

2. With respect to the allegations contained in paragraph "Sixth" of the complaint, deny that Allan S. Lehman was a co-partner in the firm of Lehman Brothers during any of the times mentioned in the complaint.

3. Deny each and every allegation contained in paragraphs "Eighth" and "Ninth" of the complaint.

[219] 4. Deny each and every allegation contained in paragraph "Tenth" of the complaint, except that they admit that neither Lehman Brothers nor Joseph A. Thomas ever purchased any of the securities of Tide Water Associated Oil Company in connection with any debt previously contracted.

5. Deny each and every allegation contained in paragraph "Eleventh" of the complaint.

6. Deny each and every allegation contained in paragraph "Twelfth" of the complaint, except that they admit and allege upon information and belief that defendant Tide Water Associated Oil Company received a letter dated June 29, 1955, a copy of which is annexed as Exhibit A to the answer of said defendant; that under date of August 22, 1955 the defendant Tide Water Associated Oil Company sent a letter, a copy of which is annexed as Exhibit B to said answer; that more than 60 days have elapsed since the receipt by said defendant

of the aforesaid letter marked Exhibit A; and that defendant Tide Water Associated Oil Company has not commenced any suit pursuant to the request of the plaintiff.

WHEREFORE, defendants other than Tide Water Associated Oil Company demand that the complaint herein be dismissed and that they be awarded the costs and disbursements of this action.

SIMPSON THACHER & BARTLETT
By EDWIN WEISL
A member of said firm
Attorneys for defendants other than Tide Water Associated Oil Company

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Notice to Admit.

SIRS:

PLEASE TAKE NOTICE that plaintiff, Isadore Blau, pursuant to the Federal Rules of Civil Procedure, requests the defendants, Lehman Brothers, to make the following admissions for the purpose of this action only within ten (10) days after service of this request. That each of the following statements is true:

1. That for some time prior to on or about August 5, 1954, defendant, John Hertz, was a member of the Board of Directors of the defendant, Tide Water Associated Oil Company.

2. That the defendant, John Hertz, resigned as a Director of defendant, Tide Water Associated Oil Company, on or about August 5, 1954.

3. That on or about August 5, 1954, the defendant, Joseph A. Thomas, was elected as a member of the Board of Directors of defendant, Tide Water Associated Oil Company, and has been a director of said corporation to the present time.

[235] 4. That during the periods in which the defendants, John Hertz and Joseph A. Thomas, respectively, were directors of defendant, Tide Water Associated Oil Company, the defendants, Lehman Brothers, have served Tide Water Associated Oil Company in various financial capacities and have received payments for such services.

5. That for some time prior to on or about December 6, 1954, the defendant, John M. Hancock, was a member of the Board of Directors of Jewel Tea Company, Inc.

6. That the defendant, John M. Hancock, resigned as a Director of Jewel Tea Company, Inc. on or about December 6, 1954.

Notice to Admit

7. That on or about December 6, 1954, the defendant, Harold J. Szold, was elected as a member of the Board of Directors of Jewel Tea Company, Inc. and has been a director of said corporation to the present time.

8. That in its Proxy Statement, dated February 25, 1955, Jewel Tea Company, Inc. made the following statement:

> "• • • Mr. Szold was elected a Director by the other members of the Board to fill the unexpired term of John M. Hancock, who resigned as of December 6, 1954 after thirty-five years of service on the Board. Mr. Szold became associated with Lehman Brothers in 1924 and has been a partner of the firm since 1941."

9. That during the periods in which the defendants, John M. Hancock and Harold J. Szold, respectively, were directors of Jewel Tea Company, Inc., the defendants, Lehman Brothers, have served said corporation in various financial capacities and have received payments for such services.

10. That for some time prior to his death in the latter part of 1956, the defendant, John M. Hancock, was a member of the Board of Directors of The International Silver Company.

11. That on or about February 27, 1957, the defendant, Frank J. Manheim, was elected as a member of the Board of Directors of The International Silver Company and has been a director of said corporation to the present time.

[236] 12. That in its Proxy Statement, dated March 14, 1957, The International Silver Company made the following statement:

Notice to Admit

"• • • The persons mentioned in the following table • • • constitute the present Board of Directors elected by the stockholders last year except for Messrs. Frank J. Manheim and Ernest S. Wilson who were elected Directors by the Board in February, 1957, to fill the vacancies created by the deaths of Messrs. Evarts C. Stevens and John M. Hancock. During the last five years Frank J. Manheim has been a partner in the firm of Lehman Brothers • • •".

13. That during the periods in which the defendants, John M. Hancock and Frank J. Manheim, respectively, were directors of The International Silver Company, the defendants, Lehman Brothers, have served said corporation in various financial capacities and have received payments for such services.

14. That for some time prior to on or about December 30, 1952, the defendant, Robert Lehman, was a member of the Board of Directors of General Cigar Company, Inc.

15. That the defendant, Robert Lehman, resigned as a Director of General Cigar Company, Inc. on or about December 30, 1952.

16. That on or about December 30, 1952, the defendant, Harold J. Szold, was elected as a member of the Board of Directors of General Cigar Company, Inc. and has been a director of said corporation to the present time.

17. That in its Proxy Statement, dated March 2, 1953, General Cigar Company, Inc. made the following statement:

"H. J. Szold was elected a director of the third class of the Company on December 30, 1952 to succeed Robert Lehman for the remainder of the term of directors of that class expiring in 1954. Mr.

Lehman served as a director until the end of the year 1952. Both Mr. Lehman and Mr. Szold are partners of Lehman Brothers."

18. That during the periods in which the defendants, Robert Lehman and Harold J. Szold, respectively, were directors of General Cigar Company, Inc., the defendants, Lehman Brothers, have served said corporation in various financial capacities and have received payments for such services.

[237] 19. That during some part of 1950 and for some time prior thereto, the defendant, Paul M. Mazur, was a member of the Board of Directors of The Dayton Rubber Company.

20. That during some part of 1950, after defendant, Paul M. Mazur, had ceased being a director of The Dayton Rubber Company, the defendant, Herman H. Kahn, was elected as a member of the Board of Directors of said corporation and has continued as such director continuously to the present time.

21. That during the periods in which the defendants, Paul M. Mazur and Herman H. Kahn, respectively, were directors of The Dayton Rubber Company, the defendants, Lehman Brothers, have served said corporation in various financial capacities and have received payments for such services.

22. That during some part of 1954 and for some time prior thereto, the defendant, John Hertz, was a member of the Board of Directors of Consolidated Vultee Aircraft Corporation.

23. That in or about May, 1954, Consolidated Vultee Aircraft Corporation was merged into General Dynamics Corporation.

Notice to Admit

24. That following this merger, and after defendant, John Hertz, had ceased being a member of the Board of Directors of Consolidated Vultee Aircraft Corporation and/or General Dynamics Corporation, Gordon Dean, an Associate of Lehman Brothers was elected to the Board of General Dynamics Corporation and served as such director until on or about April 25, 1957 at which time Dorsey Richardson, an Associate of Lehman Brothers was elected as a director of said corporation and is presently serving as such director.

25. That during the periods in which the defendant, John Hertz, and Messrs. Dean and Richardson were directors of either Consolidated Vultee Aircraft Corporation and/or General Dynamics Corporation, the defendants, Lehman Brothers, have served said corporations in various financial capacities and have received payments for such services.

[238] 26. That until on or about April 20, 1953 and for some time prior thereto, the defendant, John M. Hancock, was a member of the Board of Directors of The Brunswick-Balke-Collender Company.

27. That on or about April 20, 1953, the defendant, Harold J. Szold, was elected as a member of the Board of Directors of The Brunswick-Balke-Collender Company and has been a director of said corporation to the present time.

28. That during the periods in which the defendants, John M. Hancock and Harold J. Szold, respectively, were directors of The Brunswick-Balke-Collender Company the defendants, Lehman Brothers, have served said corporation in various financial capacities and have received payments for such services.

29. That until on or about January 19, 1956 and for some time prior thereto, the defendant, John M. Hancock,

was a member of the Board of Directors of Underwood Corporation.

30. That on or about January 19, 1956, the defendant, Joseph A. Thomas, was elected as a director of Underwood Corporation and has served as such director to the present time.

31. That during the periods in which the defendants, John M. Hancock and Joseph A. Thomas, respectively, were directors of Underwood Corporation, the defendants, Lehman Brothers, have served the said corporation in various financial capacities and have received payments therefor.

32. That for some time prior to the date of his death in the latter part of 1956, the defendant, John M. Hancock, was a member of the Board of Directors of Van Raalte Company, Inc.

33. That following the death of defendant, John M. Hancock, the defendant, Joseph A. Thomas, was elected to the Board of Directors of Van Raalte Company, Inc. and has served as such director to the present time.

34. That in its Proxy Statement, dated March 28, 1957, Van Raalte Company, Inc. made the following statement:

[239] "During 1956 three vacancies in the Board were created by the deaths of John M. Hancock and John R. Simpson and the retirement of Sidney J. Weinberg. Their places on the Board of Directors were filled by the interim election of John Fiske, Joseph A. Thomas and John L. Weinberg. During the past five years * * * Mr. Thomas' principal occupation has been a Partner of Lehman Brothers * * *".

35. That during the periods in which the defendants, John M. Hancock and Joseph A. Thomas, respectively,

were directors of Van Raalte Company, Inc., the defendants, Lehman Brothers, have served the said corporation in various financial capacities and have received payments for such services.

36. That for some time prior to the date of his death in the latter part of 1952, the defendant, Allan S. Lehman, was a member of the Board of Directors of Studebaker-Packard Corporation.

37. That following the death of defendant, Allan S. Lehman, and on or about December 19, 1952, the defendant, John Hertz, was elected as a member of the Board of Directors of Studebaker-Packard Corporation and served as such director until on or about May 20, 1955.

38. That on or about May 20, 1955, the defendant, Frank J. Manheim, was elected as a member of the Board of Directors of Studebaker-Packard Corporation and has been such director to the present time.

39. That during the periods in which the defendants, Allan S. Lehman, John Hertz and Frank J. Manheim, respectively, were directors of Studebaker-Packard Corporation, the defendants, Lehman Brothers, have served said corporation in various financial capacities and have received payments for such services.

40. That on December 8, 1954, the defendants, Lehman Brothers, converted 50,000 shares of the common stock of Tide Water Associated Oil Company into 50,000 shares of its $1.20 Cumulative Preferred stock.

[240] 41. That on December 8, 1954, the market range of the common stock of Tide Water Associated Oil Company was a low of $25¼ per share and a high of $25⅞ per share.

42. That between December 9, 1954 and March 8, 1955, inclusive, the defendants, Lehman Brothers, sold 50,000

shares of its $1.20 Cumulative Preferred stock of Tide Water Associated Oil Company realizing net proceeds therefrom in the sum of $1,361,186.77.

Dated: New York, New York; October 21, 1957.

Yours, etc.

MORRIS J. LEVY
Attorney for plaintiff

To:

Simpson, Thacher & Bartlett, Esqs.
Attorneys for defts, other than Tide Water Associated Oil Co.

Hecht, Hadfield, Farbach & McAlpin, Esqs.
Attorneys for defendant, Tide Water Associated Oil Company

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Responses of Defendants Lehman Brothers to Plaintiff's Notice to Admit.

Defendants Lehman Brothers, for their responses to the items contained in plaintiff's Notice to Admit dated October 21, 1957, without admitting the relevancy or materiality of any of the admissions contained herein, and reserving their rights at any and all times during the pendency of this action, including the trial thereof, to object to the admission in evidence of any or all of such responses upon the ground that they or any of them is irrelevant or immaterial to any of the issues in this action.

1. Admit the statements contained in Items 1, 2, 3, 5, 6, 7, 10, 11, 14, 15, 16, 19, 20, 22, 23, 26, 27, 29, 30, 32, 33, 38, 40, 41 and 42 of said Notice to Admit.

2. Deny the statement contained in Item 4 of said Notice to Admit, except that they admit that on one occasion in 1945 while defendant John Hertz was a director of defendant Tide Water Associated Oil Company, and on another occasion in 1956 while defendant Joseph A. Thomas was a director of said defendant Company, defendants Lehman Brothers participated with others as underwriters of certain securities of said defendant Company and on each such occasion were paid a commission for such services; and that [245] on one occasion in 1940 while defendant John Hertz was a director of said defendant Company, defendants Lehman Brothers received a commission for services rendered in connection with a private placement of certain securities of said defendant Company.

3. Admit that Jewel Tea Company, Inc. issued a Proxy Statement dated February 25, 1955, but deny that the statement contained in Item 8 of said Notice to Admit constitutes the entire Proxy Statement.

Responses of Defendants Lehman Brothers to Plaintiff's Notice to Admit

4. Deny the statement contained in Item 9 of said Notice to Admit, except that they admit that on three occasions in 1941, 1947 and 1953 respectively, while defendant John M. Hancock was a director of Jewel Tea Company, Inc., defendants Lehman Brothers participated with others as underwriters of certain securities of said Company and on each such occasion were paid a commission for such services; that on one occasion in 1951 while defendant John M. Hancock was a director of Jewel Tea Company, Inc., defendants Lehman Brothers received a fee for services rendered in connection with a private placement of certain securities of said Company, and that in 1951 defendants Lehman Brothers received a fee from said Company for other services rendered in connection with financial matters.

5. Admit that International Silver Company issued a Proxy Statement dated March 14, 1957, but deny that the statement contained in Item 12 of said Notice to Admit constitutes the entire Proxy Statement.

6. Deny the statement contained in Item 13 of said Notice to Admit, except that they admit that on one occasion in 1955 while defendant John M. Hancock was a [246] director of International Silver Company, defendants Lehman Brothers received a fee from said Company for services rendered in connection with financial matters.

7. Admit that General Cigar Company, Inc. issued a Proxy Statement dated March 2, 1953, but deny that the statement contained in Item 17 of said Notice to Admit constitutes the entire Proxy Statement.

8. Deny the statement contained in Item 18 of said Notice to Admit, except that they admit that on one occasion in 1929, while defendant Robert Lehman was a director of General Cigar Company, Inc., defendants Leh-

man Brothers participated with others as underwriters of certain securities of said Company and were paid a commission for such services; that on one occasion in 1948 while defendant Robert Lehman was a director of said Company, defendants Lehman Brothers received a commission for services rendered in connection with a private placement of certain securities of said Company, and that in 1957, while defendant Harold J. Szold was a director of said Company, defendants Lehman Brothers received a fee for services rendered in connection with a reclassification of certain of the capital stock of said Company.

9. Deny the statement contained in Item 21 of said Notice to Admit, except that they admit that on three occasions in 1952, 1955 and 1957 respectively, while defendant Herman H. Kahn was a director of Dayton Rubber Company, defendants Lehman Brothers participated with others as underwriters of certain securities of said Company and on each such occasion were paid a commission for such services; that on one occasion in 1950 while [247] defendant Herman H. Kahn was a director of said Company, defendants Lehman Brothers received a commission for services rendered in connection with a private placement of certain securities of said Company; and that during the period in which defendant Paul M. Mazur was and defendant Herman H. Kahn has been a director of said Company, and prior thereto, defendants Lehman Brothers received an annual fee from said Company for services rendered in connection with financial matters.

10. Deny the statement contained in Item 24 of said Notice to Admit, except that they admit that, after the merger of Consolidated Vultee Aircraft Corporation into General Dynamics Corporation, Gordon Dean, a part-time consultant of Lehman Brothers, was elected to the

Responses of Defendants Lehman Brothers to Plaintiff's Notice to Admit

Board of Directors of General Dynamics Corporation and served as a director thereof until on or about April 25, 1957, and that on or about April 25, 1957, Dorsey Richardson, an employee of Lehman Brothers, was elected a director of said Corporation and is presently serving as such.

11. Deny the statement contained in Item 25 of said Notice to Admit, except that they admit that on one occasion in 1955, while the aforesaid Gordon Dean was a director of General Dynamics Corporation, defendants Lehman Brothers participated with others as underwriters of certain securities of said Corporation and were paid a commission for such services.

12. Deny the statement contained in Item 28 of said Notice to Admit, except that they admit that on one occasion in 1957, while defendant Harold J. Szold was a director of Brunswick-Balke-Collender Company, defendants [248] Lehman Brothers participated with others as underwriters of certain securities of said Company and were paid a commission for such services.

13. Deny the statement contained in Item 31 of said Notice to Admit, except that they admit that on one occasion in 1956, while defendant Joseph A. Thomas was a director of Underwood Corporation, defendants Lehman Brothers participated with others as underwriters of certain securities of said Corporation and were paid a commission for such services.

14. Admit that Van Raalte Company, Inc. issued a Proxy Statement dated March 28, 1957, but deny that the statement contained in Item 34 of said Notice to Admit constitutes the entire Proxy Statement.

15. Deny the statement contained in Item 35 of said Notice to Admit, except that they admit that on one

occasion in 1956, while defendant John M. Hancock was a director of Van Raalte Company, Inc., defendants Lehman Brothers received a commission for services rendered in connection with a private placement of certain securities of said Company.

16. Deny the statement contained in Items 36 and 37 of said Notice to Admit, except that they admit that Allan S. Lehman died on or about November 10, 1952, that for some time prior to his death he had been a member of the Board of Directors of Studebaker Corporation, that on or about December 19, 1952 defendant John Hertz was elected a member of the Board of Directors of Studebaker Corporation and served as such until October 1, 1954, and that thereafter defendant John Hertz became a member of [249] the Board of Directors of Studebaker-Packard Corporation and served as such until on or about May 20, 1955.

17. Deny the statement contained in Item 39 of said Notice to Admit.

Dated: New York, New York, November 14, 1957

LEHMAN BROTHERS
By HERMAN H. KAHN
A Member of the Firm

Simpson Thacher & Bartlett
Attorneys for Defendants other than
Tide Water Associated Oil Company
By Stephen P. Duggan, Jr.
A Member of the Firm

(Verified by Herman H. Kahn, November 14, 1957.)

[1]

Transcript.

Before:

Hon. Archie O. Dawson, District Judge.

New York, April 27, 1959,
10:30 o'clock a. m.

[2]

Appearances:

[3] **The Court: Plaintiff may proceed.**

Mr. Levy: If your Honor please, I don't know whether you would wish an opening statement in this case or whether you are familiar with the facts.

The Court: I have read the defendants' trial brief which was submitted last week. I haven't had time to read yours which you just handed me, but I think I have a pretty good idea from the pleadings and the trial brief I read as to what the general issue in the case is.

Mr. Levy: May I make a brief opening statement?

The Court: Surely.

Mr. Levy: This is an action brought by the plaintiff, a stockholder of Tidewater Associated Oil Company, for its benefit pursuant to Section 16 (b) of the Securities and Exchange Act of 1934. The action is against Joseph Thomas, a director of Tidewater, and the members of his partnership, Lehman Brothers.

With a six-month period in 1954 and 1955 Lehman Brothers converted 50,000 shares of Tidewater common stock, receiving in exchange therefor 50,000 shares of its preferred stock, and within a period of less than six months thereafter Lehman Brothers sold 50,000 shares [4] **of Tidewater preferred stock, and it is plaintiff's contention that there was a profit realized in the sum of approximately $100,000.**

It is further plaintiff's contention that by reason of the fact that Joseph Thomas was a director of Tidewater and also a general partner in Lehman Brothers he gave facts concerning the Tidewater business, the Tidewater policies to the members of his firm and that pursuant to statute they, meaning Lehman Brothers, are a person within the meaning of Section 16 (b) and, therefore, collectively were directors of Tidewater and subject to liability under the statute.

We will prove these facts. We will prove that Mr. Thomas told certain of his partners prior to the purchase of the Tidewater stock of the business and the business policies of Tidewater—

The Court: Does that make any difference under this statute?

Mr. Levy: Well, under Judge Learned Hand's opinion in the case of Rattner against Lehman—

The Court: Which was merely a concurring opinion.

Mr. Levy: That's right. It might make a difference. We will prove these matters before your [5] Honor and show that the inside information that Joseph Thomas gleaned as a director was imparted to the members of his general partnership and that there cannot be any cleavage between himself as a director and a general partner, and that his acts, in view of the fact that they were in a business of providing financing for Tidewater as well as other corporations, were the acts of the partnership.

The Court: Would that state of facts, exclusive of the statute, give a right of recovery?

Mr. Levy: I believe so, your Honor.

The Court: Were you relying purely on Section 16 (b) or are you relying on some other part of the law?

Mr. Levy: I am relying upon that, Section 16 (b), and opinions expressed by the Securities and Exchange Commission, in the case of *Rattner v. Lehman*—

Transcript

The Court: You are bringing your action merely under the statute?

Mr. Levy: That's right, sir.

The Court: All right.

Mr. Levy: Now, firstly, your Honor, I would like to amend the title of the action, since I have been [6] informed that following the commencement of this suit the name of the defendant Tidewater Associated Oil Company was changed, on May 3, 1956, to Tidewater Oil Company, and I so move, your Honor.

The Court: All right. I take it that there is no objection to that.

Mr. Hays: No objection.

Mr. Levy: I ask the defendants' counsel to stipulate that Isadore Blau is and has been a stockholder of Tidewater Oil Company during all times prior to the commencement of this action and up to the present time.

Mr. Vance: I so stipulate.

The Court: All right.

Mr. Levy: With your Honor's permission I should like to read from the deposition of the defendant Thomas taken June 19, 1956.

Would your Honor care to see this original?

The Court: Well, you can read both the questions and the answers. You don't have anybody to put on the witness stand to read the answers so you may as well do both.

Mr. Levy: I have nobody to put on the witness stand, your Honor.

[7] The Court: All right, you go ahead.

Mr. Vance: Your Honor, Mr. Carlson will go on the stand and read the answers, if that is all right with Mr. Levy.

Mr. Levy: Fine.

The Court: It makes it a little more realistic if you have someone asking questions and somebody else answering them.

Mr. Levy: Yes.

Would the defendant stipulate that Joseph Thomas, during all the times mentioned in the complaint, was a director of Tidewater Oil Company and that he was also a general partner in Lehman Brothers?

Mr. Vance: I will so stipulate.

Mr. Levy: Will the defendants also stipulate that a demand was made upon Tidewater Oil Company to commence suit against these defendants and that Tidewater Oil Company refused to commence such suit, and that plaintiff commenced such suit following more than 60 days after such request.

Mr. Hays: We will stipulate that.

The Court: All right.

Mr. Levy: I should like to introduce, before I start reading the deposition of Joseph Thomas, [8] items 1 through 4 of plaintiff's notice to admit, and I will read each item separately.

"1. That for some time prior to or on or about August 5, 1954, defendant John Hertz was a member of the board of directors of the defendant Tidewater Associated Oil Company."

Mr. Vance: Just a minute, Mr. Levy. May I find my copy of the notice to admit first?

Mr. Levy: I am sorry.

Mr. Vance: Your Honor, I am going to have objections to some of these requests for admissions which are being read at the present time.

Would you wish me to wait until he has completed reading all four of them?

The Court: To the extent that they are admitted, why, Mr. Levy may read the admissions.

If they are not admitted, I don't see that there is any remedy that Mr. Levy has except to try to collect costs.

Transcript

Mr. Vance: Your Honor, we have answered and reserved our rights to object at the time of trial on the grounds of relevancy and materiality, and Mr. Levy has so stipulated with us, so we have given him admissions with respect to all of the questions propounded, [9] but we have reserved until this time the right to object.

Mr. Levy: That is so, your Honor.

The Court: All right. Mr. Levy, after that demand for admissions you better read whatever the admissions were and the objections that were made.

Mr. Levy: Item No. 2 of plaintiff's—

The Court: What happened to item No. 1?

Mr. Levy: Well, item No. 1 is admitted by the defendants, your Honor. They admit a number of other items in the same paragraph in which they state—and I am quoting—"Admit the statements contained in items 1, 2, 3, 5, 6" —and so forth, so that when I—

The Court: That is an admission that Mr. Hertz was a director?

Mr. Levy: Yes, sir.

Now, item No. 2 of plaintiff's notice to admit requested the following:

"That the defendant John Hertz resigned as a director of defendant Tidewater Associated Oil Company on or about August 5, 1954."

That is also admitted by the defendant.

Mr. Vance: Now, your Honor, with respect to both of those requests for admissions and the answers [10] thereto, we object on the grounds that they have no relevancy or materiality under the issues as framed by the pleadings in this action.

The Court: Well, I will take it for what it is worth. What was that date?

Mr. Levy: August 5, 1954.

Item No. 3 of plaintiff's notice to admit:

"That on or about August 5, 1954, the defendant Joseph A. Thomas was elected as a member of the board of directors of defendant Tidewater Associated Oil Company and has been a director of said corporation to the present time."

The defendants admit this item also.

Item No. 4 of plaintiff's notice to admit:

"That during the periods in which the defendants John Hertz and Joseph A. Thomas respectively were directors of defendant Tidewater Associated Oil Company, the defendants Lehman Brothers have served Tidewater Associated Oil Company in various financial capacities and have received payments for such services."

With respect to that item, the defendants state the following:

[11] They deny the statement contained in item 4 of said notice to admit except that they admit that on one occasion in 1945, while defendant John Hertz was a director of defendant Tidewater Associated Oil Company, and on another occasion in 1956 while defendant Joseph A. Thomas was a director of said defendant company, defendants Lehman Brothers participated with others as underwriters of certain securities of said defendant company, and on each such occasion were paid a commission for such services, and that on one occasion in 1940, while defendant John Hertz was a director of said defendant company, defendants Lehman Brothers received a commission for services rendered in connection with the private placement of certain securities of said defendant company.

Mr. Vance: Your Honor, we object to the request for admission No. 4 on the grounds that the fact that at one time or other Lehman Brothers may have rendered

financial services to Tidewater is not relevant or material to the issues in this action.

The Court: What is the relevancy to the issues in this action, Mr. Levy?

Mr. Levy: Well, your Honor, I wanted to show a preconceived design or plan which I have indicated [12] by—

The Court: Well, what difference does that make under the statute? That is why I asked you right at the beginning if your are relying on the statute. You said you were, so we are going to keep right within it.

Mr. Levy: I am relying on the statute, your Honor, and I say that a preconceived plan or scheme whereby the defendants put directors upon various corporations for the purpose of gleaning information and getting financial aid or financial business from them, is such a scheme that—

The Court: Where in the statute do you find anything about that?

Mr. Levy: The statute does not specifically—

The Court: Then it is irrelevant.

Mr. Levy, if you thought this thing out, you are either relying on the statute or you are relying on something else.

Now, if you are relying on the statute and taking that, then the rest of this is all irrelevant.

Mr. Levy: I am relying on the statute, but I am trying to show a connection here between Lehman Brothers and Joseph Thomas. I must show that [13] connection.

The Court: The only connection you need show under the statute is that he was a director of the company.

Mr. Levy: Under Judge Learned Hand's opinion—

The Court: I am not following Judge Learned Hand's opinion as being the law. He was merely expressing what he would not construe an opinion to be. He did not make the law. The law was made and passed by Congress.

Mr. Levy: That is right.

Now, also, your Honor, under the case decided by Judge Medina in the Bankers case, which I have cited in my trial memorandum, and which was decided by the Court of Appeals in Washington, with respect to CAB against Lehman Brothers, apparently the fact that a defendant is a director of a corporation is material to show how the directorship is interwoven witth a partnership, and I stand on the fact, your Honor, that the defendant, Joseph A. Thomas, as a director, imparted certain information to Lehman Brothers—

The Court: But you are relying merely on the statute?

[14] Mr. Levy: Yes.

The Court: Now maybe you have a cause of action in something other than the statute but—

Mr. Levy: I am relying on the statute, your Honor, and I say that Lehman Brothers stand in the same shoes as Joseph A. Thomas, and I am trying to show a connection between Joseph A. Thomas' position as a director and his position as a general partner.

I am trying to show that they are one and the same, that Lehman Brothers cannot be disassociated from Joseph A. Thomas as a director. The partner cannot be disassociated from the director.

The Court: That is a matter of law.

Mr. Levy: Yes.

The Court: What are the facts?

Mr. Levy: I want to show that the fact that Lehman Brothers put Joseph A. Thomas on the board of Tidewater actually shows the connection where they actually got the information from Joseph A. Thomas in order to trade in the securities of Tidewater.

The Court: Is that a violation of anything in the statute?

Mr. Levy: That, in my opinion, your Honor, is a violation of the statute, because the statute says [15] that

any means that is employed to violate the statute is a violation of the statute.

The Court: Where does it say that in the statute, in Section 16 (b), which I understand you are relying on?

Mr. Levy: It doesn't say that in the statute, but it has been construed by the courts, your Honor, in those very words.

The Court: Then your are not relying on the statute.

Mr. Levy: I am relying on the statute as having been construed by the courts, your Honor.

The Court: Where in the statute does it say that a director who is a member of a partnership has the same liability as a member of the partnership?

Mr. Levy: That is not stated in the statute but—

The Court: Then I will sustain the objection to this. I I will sustain the objection to this admission because I cannot see that it has got anything to do with your cause of action at all.

Mr. Levy: May I ask your Honor whether or not the decisions of the courts construing this section are pertinent to this action?

[16] The Court: They certainly are. I wish you had given me your brief ahead of time like you were supposed to under the rules.

Mr. Vance: Your Honor, might I state that the decision construing this particular rule is the decision of the majority in the Rattner case where they held—

The Court: I realize that.

Mr. Levy: I refer, your Honor, to the case of *Smolowe v. Delendo Corporation*, 136 F. 2d 231, where the court stated "Indeed, it appears to have been the intention of Congress to strike down any means by which insiders, because of their special knowledge of the affairs of the corporation, or the plans of its board of directors, might realize for themselves a short swing profit."

The Court: That was maybe the intention of Congress, but if they did not pass the necessary statute to carry that into effect, then there is nothing that the Court can do about it.

Mr. Levy: The court has apparently leaned over backwards—

The Court: What does the court say about extending that far, as it is your contention?

[17] Mr. Levy: That is my contention, that in the facts of this case, it extends from a director-partner to the partnership because the business of the partnership was financing, and they got the business from Tidewater, and I say that under those circumstances the partnership can be held and must be held in order not to emasculate the statute.

The Court: That is an argument that should have been addressed to Congress and not to the Court. Congress passed a very definite statute, and that statute is the one you are relying upon, as I understand it. Now, there may be some common law principle that you could have relied upon, but you are not relying upon that, apparently.

Well, all right, proceed with the next one. I can't see that what you had in that demand for the admission and that admission makes any material difference in this case. There are certain facts here which are obvious, and I don't think you get anywhere by trying to go into a lot of things which may be irrelevant.

Mr. Levy: Believe me, your Honor, if I thought they were irrelevant I would not attempt to foist them upon this court. I am not trying to waste the time of [18] this court.

Deposition of Joseph A. Thomas

I wish now to read from the deposition of the defendant JOSEPH A. THOMAS, at page 3, question 2.

"Q. Mr. Thomas, you were a partner in Lehman Brothers? A. Yes, I am a partner in Lehman Brothers."

Question 4:

"Q. In what business are you? A. Investment banking, generally; members also of the New York Stock Exchange and other exchanges."

Mr. Levy: Page 4, question 4:

"Q. How long have you been with Lehman Brothers, Mr. Thomas? A. Since 1930."

Question 1: page 5:

"Q. Does Lehman Brothers trade in securities on its own? A. For its own account?

"Q. Yes. A. Yes.

"Q. Is that done very often? A. Well, there is no fixed policy about it. They do buy and sell securities for their own account as well as act as brokers."

[19] Mr. Levy: Page 6, question 3:

"Q. Prior to your having been elected as a member of the board of Tidewater was there a member of Lehman Brothers who was a director of Tidewater?"

Mr. Vance: Your Honor, I object to the question—I can't see the relevancy of it.

The Court: Overruled. Answer.

Mr. Levy: (Continuing)

"A. Sometime previous to my election in John Hertz, who was then and still is a partner of Lehman Brothers, had been a director of Tidewater."

Deposition of Joseph A. Thomas

Mr. Levy: Page 7, question 6:

"Q. Isn't it a fact, Mr. Thomas, that the various members of Lehman Brothers hold directorships in various corporations?"

Mr. Vance: Objection, your Honor.
The Court: Overruled.
Mr. Levy: (Continuing)

"A. Well, as individuals some of my partners are directors of various corporations, yes, but not as a function of Lehman Brothers. To elaborate, we hold directorships, by which I mean the various individuals in companies that have no connection whatever with Lehman Brothers. I happen to be a director of a ski [20] manufacturing company.

"Q. Of course, the directorships held by the various members of the partnership are held in various industrial and banking corporations, are they not?"

Mr. Vance: Your Honor, I object to that.
The Court: Overruled.
Mr. Vance: May I have a continuing objection to this line of questioning?
The Court: Yes.
Mr. Levy: (Continuing)

"A. I guess that would be the proper characterization.

"Q. As a matter of fact, Mr. Thomas, you, yourself, are a director in a number of industrial and banking corporations, are you not? A. Yes, I am."

Mr. Levy: Page 9, question 4:

"Q. Lehman Brothers has meetings, weekly meetings, of the general partners, do they not, Mr. Thomas? A. We have an informal meeting usually occurring when you get enough people there, on Mondays after lunch. It is not a formal meeting. There is no agenda or anything like that.

Deposition of Joseph A. Thomas

"Q. At these meetings various things are discussed. [21] A. Whatever seems important at the moment.

"Q. Is it customary at these meetings to discuss matters in which Lehman Brothers has an interest, financial or otherwise? A. As a firm?

"Q. Yes. A. A firm interest?

"Q. Yes. A. Yes. That would be the nature of the meeting."

Mr. Levy: Page 11, question 1:—

Mr. Vance: Just a second, Mr. Levy, before you go too fast.

I wish you would read question 5 and the answer to that which follows the questions which you just read.

Mr. Levy: Do you want to read it on cross examination? You are perfectly at liberty—

The Court: Do you want to read it right now?

Mr. Vance: Yes. (Reading)

"Q. Is it also customary at these meetings to have the directors or a director who is a member of Lehman Brothers and is also a member of a corporation in which Lehman is interested—is it the usual thing to discuss the finances of that corporation [22] with respect to the interest of Lehman Brothers in that corporation? A. Well, your question is rather involved. If I understand what you mean, it is not the policy of Lehman Brothers for directors to discuss the affairs of their companies before a lot of people who are not concerned. I think it would be most improper. A good many of these companies are competitive."

Mr. Levy: (Reading)

"Q. You have a substantial interest in Lehman Brothers, do you not, Mr. Thomas? A. Yes."

Mr. Levy: May I at this time request the defendants to stipulate the percentage of interest which Mr. Thomas had in Lehman Brothers at the time of these transactions?

Mr. Vance: Your Honor, this is a confidential matter. If liability should be established or if at some point your Honor feels it is proper to go into what his percentage is, of course I will be glad to make it available.

The Court: Was he a general partner?

Mr. Vance: He was a general partner, [23] your Honor.

The Court: Why do we need to go into his financial interest?

Mr. Levy: Because in *Ratner v. Lehman*—that was one case that I was the attorney for the plaintiff—we did not attempt to prove a connection between the director and Lehman Brothers, the partnership in any way except the bald statement that he was a partner, and in that case the court held that recovery may be had against the individual partner of his proportional interest in the partnership, and under the same case law, your Honor, the defendant Thomas, if not the defendants Lehman brothers, is responsible for his proportionate share of the Lehman Brothers profits, and, therefor, your Honor, it is important to know what his interest in Lehman Brothers was.

The Court: Mr. Vance, I don't know why his percentage of participation in Lehman Brothers should not be put on the record.

Mr. Vance: If your Honor deems it relevant at this point—

The Court: I think so. His percentage—I don't mean in dollars; I don't mean his financial transactions, but what was his percentage.

[24] Mr. Vance: All right, your Honor. I will obtain that at the luncheon recess and state it to the Court at that time, and if your Honor wishes it may be deemed taken as of this moment.

The Court: All right.

Mr. Levy: Page 13, question 1:

"Q. Who recommended you, Mr. Thomas, to be proposed upon the board of Tidewater? A. I don't know.

"Q. How did you come to be proposed on the board of Tidewater? A. Well, I was introduced to Mr. Staples, the new president of the company, and Mr. Staples and I lunched together several times, got to know one another, and after a month or two he rang me up one day and asked me if I would like to be a director, asking me if I would at the same time resign from the board of the Monterey Oil Company, which was another California oil company.

"Q. Who introduced you to Mr. Staples? A. I believe it was either John Schiff—it was either John Schiff or someone else in his firm. I think it was John Schiff. I think I met him at John Schiff's house in the country."

[25] Mr. Levy: Question 3:

"Q. Did Mr. Hertz have anything to do with"—

Mr. Vance: Would you read question 2, please?

Mr. Levy: All right. (Continuing)

"Q. John Schiff is a member of Lehman Brothers? A. No, he is a partner of Kuhn, Loeb & Company, and a personal friend of mine. I don't say that John Schiff recommended me to the board; I didn't say that.

"Q. Did Mr. Hertz have anything to do with your being proposed to the board of Tidewater? A. I don't know. Mr. Hertz called me once from California on the phone and said that Dave Staples had asked him about me, was I any good or not. I assume he replied to it affirmatively; I hope so."

Deposition of Joseph A. Thomas

Mr. Levy: Page 55, question 1:

"Q. Prior to your being elected a director of Tidewater, Mr. Hertz, who is a general partner of Lehman Brothers, was a director of Tidewater, was he not? A. He was.

"Q. And when he left Tidewater he knew that you were going to be proposed as a director on Tidewater's board, did he not?"

Mr. Vance: There was an objection interposed [26] at that point.

The Court: Overruled. He may answer.

Mr. Levy: There is no answer given.

Mr. Vance: Yes, there is.

Mr. Levy: (Continuing)

"A. I would have no way of knowing whether John Hertz knew if Tidewater was interested in me. I never discussed the subject with him.

"Q. You knew that Mr. Hertz was a director of Tidewater before you were appointed? A. I knew he had resigned also."

Mr. Levy: Page 61, question 2:

"Q. Did you know the members of the board of directors of Tidewater prior to your election? A. I knew all of them but two. Two I had never met.

"Q. Had you had any discussion with any members of the board of directors of Tidewater with respect to your being put on the Tidewater board prior to your election? A. I discussed the matter with John Schiff. I told him I had been invited to become a director.

"Q. Did you discuss it with any other members of the board? [27] A. Naturally, with Mr. Staples and Mr. Williams, the executive vice-president. Both of them had tendered the invitation to me.

Deposition of Joseph A. Thomas

"Q. And you testify it was about a month prior to your election that you discussed the matter with him? A. That is right."

Mr. Levy: Page 62, question 1:

"Q. Mr. Thomas, Mr. Hertz who was a member of your firm, of Lehman Brothers, resigned from the Tidewater board on August 5th, 1954, is that correct?"

Mr. Vance: Your Honor, the record shows that at that point counsel for Mr. Hertz interposed: "His resignation was accepted on August 5th."

Mr. Levy: (Continuing)

"A. His resignation was accepted; that is correct.

"Q. And on that date you became a director of Tidewater, is that right? A. I did.

"Q. When you had your discussion with Mr. Schiff approximately a month before that date Mr. Hertz was still a member of the Tidewater board, was he not? A. Well, his resignation had not been accepted at that time. That is right.

"Q. Do you recall when he submitted his resignation to the board? [28] A. I don't know.

"Q. Did you speak to him about his resigning from the Tidewater board, prior to his doing so? A. John Hertz is an elderly man and he has been anxious to retire more and more from being active, and I don't see him very often because he is not in the office very often. I knew that, generally speaking, he was going to get off as many boards as he could. I don't remember discussing specifically this board or that board, but I knew it applied all up and down the line.

"There was another reason for Tidewater, because Mr. Hertz was a close friend of Mr. Humphrey, the previous president of Tidewater, and Mr. Humphrey resigned from the management—I have the feeling that Mr. Hertz kind

of felt that the closeness there was gone, and he might as well resign."

Mr. Levy: Page 73, question 1:

"Q. You have testified that you spoke to Mr. Schiff about a month before you were elected, or appointed, as a director; is that right? A. That is to the best of my memory, yes."

Mr. Levy: Page 74, question 2:

Mr. Vance: Mr. Levy, will you read questions [29] 2, 3 and 4 on that page, or do you wish me to read it?

Mr. Levy: Well, either way.

Mr. Vance: I will be happy to.

The Court: Why don't you read it, Mr. Levy?

Mr. Levy: (Reading)

"Q. Where did your conversation with Mr. Schiff take place? A. I think it was over the telephone.

"Q. Did he call you or did you call him? A. I don't know. We are friends, you know, and play golf together, and we talk to one another."

Mr. Vance: Go ahead, Mr. Levy. Read over to the next page.

Mr. Levy: (Reading)

"Q. In any event, you got each other on the telephone, and could you tell us what he said to you and what you said to him as best you can recollect? A. I recollect I said to Mr. Schiff that I had been invited to come on the board of Tidewater, and he said, 'Well, I hope you do, because it will give me somebody to make those trips to San Francisco with.' It was a considerable conversation.

"Q. In other words, you told him that you had been invited to be on the board of directors? [30] A. Yes.

Deposition of Joseph A. Thomas

"Q. Did you tell Mr. Schiff who invited you? A. I believe I did; Dave Staples.

"Q. When did you speak to Dave Staples about this? A. He rang me sometime before. I can't be exactly accurate about the time.

"Q. As best as you can place it. A. Must have called me the latter part of July, or the first few days in August.

"Q. And you had a conversation with him over the telephone? A. Yes. He said he would like to have me come on the board, if I wanted to."

Mr. Vance: That is all you need to read as far as I am concerned.

Mr. Levy: (Continuing)

"Q. Did he tell you there was a vacancy open? A. Well, he told me that there would be room for me on the board. We didn't discuss it. I assumed that he was offering me a position that he had the right to offer me.

"Q. Did he tell you that Mr. Hertz was resigning from the board? A. He did, and he said with much regret, as he [31] thought Mr. Hertz was a fine man, competent, and complimentary things of that nature.

"Q. What else did he tell you, as you recall it? A. There was nothing else; it was a very short conversation. Well, there was one other thing. He said he hoped I wouldn't mind resigning from the board of Monterey, since there could be some competitive problems there.

"Q. At that time how many shares of stock did you own in Tidewater? A. I, personally?

"Q. Yes. A. I didn't own any stock in Tidewater at that time. I owned some Mission Development Corporation, which is the same thing, just a cheaper way to buy Tidewater.

"Q. At that time how many shares of stock did you own, personally, in Monterey Oil, as near as you can

recollect? A. I must have owned four or five thousand shares of stock."

Mr. Levy: Page 77, question 5:

"Q. Did you have a discussion with any of your partners with respect to the suggestion thrown out [32] by Mr. Staples that he wanted you on the board of Tidewater? A. Mr. Hertz was aware of the thing. I told Robert Lehman that I had been invited to be on the board. It is perfectly natural.

"Q. Could you tell us how that conversation came up? A. Originated with me. I was pleased by this offer, and Robert Lehman is a senior member of the firm, and I told him of the invitation. He congratulated me. He thought it was a compliment to me to be invited: I did, too."

Mr. Vance: Will you read the next question, please? I will read it, Mr. Levy.

"Q. Did he urge you to accept it? A. No.

"Q. Did he suggest that it might be good for you or be good for the firm if you accepted it? A. No. As I remember the conversation, he said, 'I think that is quite an honor this new management has paid you, to ask you to go on.'

"Q. During the course of the conversation, was Mr. Hertz mentioned, the fact that Mr. Hertz was leaving the board of directors of Tidewater? A. I don't think Mr. Hertz was mentioned in [33] that conversation at all."

Mr. Levy:

"Q. Do you recall any conversation with either Mr. Lehman or any other member of your firm where Mr. Hertz' name or the fact that he was leaving Tidewater's board of directors was mentioned? A. Well, not specifically. But Mr. Hertz' retirement from active partici-

pation was mentioned a good many times. It was common talk that Mr. Hertz was getting older and he is less active, and we all knew that he would rather go back to his horse farm than spend a lot of time in his business.

"Q. And these discussions took place at your weekly get-togethers of Lehman Brothers? A. No, they were strictly informal. It was never discussed of any particular moment, other than the fact that John Hertz doesn't come around any more, he is gradually seeking retirement."

Mr. Levy: Page 15.

Mr. Vance: Page 15 of this deposition?

Mr. Levy: That's right. Question 3:

"Q. Do you recall any underwriting business that Lehman Brothers got from Tidewater?"

Mr. Vance: Objection, your Honor.

[34] The Court: Overruled.

Mr. Levy: (Continuing)

"A. We participated within the matter of the last few months in a $50 million bond issue for Tidewater which was headed by Eastman Dillon Company. We participated with Kuhn, Loeb and Eastman Dillon."

Mr. Levy: Question 3:

"Q. You testified a little while ago"—

Mr. Vance: What page, please?

Mr. Levy: I am sorry; page 16:

"Q. You testified a little while ago that Lehman Brothers has an industrial department. A. Yes.

"Q. Of what does that consist? A. That consists of about fifteen young men who are engaged primarily on investigative activities, in all industries, not confined to any one particular group."

Deposition of Joseph A. Thomas

Mr. Levy: Page 18, question 1:

"Q. Of course, the industrial department has contact with the general partners of Lehman Brothers, do they not? A. Oh, yes, as all employees do.

"Q. And they do know which member of Lehman Brothers is on a particular board of an industrial [35] or other corporation? A. I should guess they would know the names of the directors of all the corporations, as a matter of public record."

Mr. Levy: Question 4:

"Q. Has it ever occurred, Mr. Thomas, where a young man from the industrial department would approach you with respect to ascertaining certain details of, say, Tidewater or any other company in which you were a director? A. It has happened. I would send him direct to the company, just as I would any other person. I have sent many introductions, not only to companies in which I am a director but also to companies where I am not a director."

Mr. Levy: Page 30, question 4:

"Q. In 1954 did Lehman Brothers purchase any securities from Tidewater, or of Tidewater? A. Yes. They purchased some securities; Arbitrage Department purchased—I don't know—several thousand shares."

Mr. Levy: I ask the defendants to stipulate at this time that 50,000 shares of common stock of Tidewater were purchased by Lehman Brothers.

[36] Mr. Vance: I will so stipulate, but I am going to ask you to read in from Mr. Thomas' deposition the questions and answers which relate to his knowledge with respect to the purchases, and if you don't want to read it in I am going to read it in to clarify what you have read there.

Mr. Levy: I don't know what you are referring to, Mr. Vance. But may I continue, and if you want to—

Mr. Vance: You may, and then I will continue, if that is all right, your Honor, with Mr. Carlson on this point after Mr. Levy has finished.

Your Honor, would you read me back my stipulation there? I may have spoken a bit hastily.

(Record read.)

Mr. Vance: 50,000 shares of common stock. That's correct. That is so stipulated.

Mr. Levy: Would you also stipulate, Mr. Vance, that these 50,000 shares of Tidewater common stock were purchased by Lehman Brothers during the period commencing October 8, 1954, and ending November 15, 1954?

Mr. Vance: Let me check the schedule on that, if I might. I believe we have a schedule here.

[37] What were those dates, Mr. Levy?

Mr. Levy: October—

Mr. Vance: 8, 1954, through November 15, 1954?

Mr. Levy: That's right.

Mr. Vance: I so stipulate.

Mr. Levy: Page 41, question 1:

"Q. Which of the partners are in charge, or supervise the purchases of securities by Lehman Brothers? A. We have a so-called Portfolio Committee, of which I am not a member, consisting of about five partners. Because we are in and out all the time and someone has to be there when a decision is necessary to be made.

"I don't know, necessarily, who was there during that time. I travel a great deal, in my affairs, and this is not the type of transaction that I am ever identified with at Lehman Brothers.

"Q. Can you tell us who the members of the Portfolio Committee were in 1954, prior to the purchase and sale of

Tidewater stock? A. It would have to be a guess, because they frequently change. But I would guess that my partner, Mr. Hammerslough, was on that committee, and Mr. Glazier was on that committee, and perhaps Mr. Gutman [38] was on that committee at that time. I am not exactly sure."

Mr. Levy: Page 43, question 5:—

Mr. Vance: Would you read question 2 through 4, please, on that page, Mr. Levy?

Mr. Levy: I want it distinctly understood I am reading it at your suggestion.

Mr. Vance: All right, sir.

Mr. Levy: Question which?

Mr. Vance: 2. I will read it:

"Q. Prior to the purchase of Tidewater common stock by Lehman Brothers, did any members of the Portfolio Committee discuss with you the advisability of purchasing the stock? A. No.

"Q. You were a director of Tidewater at the time, were you not? A. Yes.

"Q. Did you ever discuss, or did Mr. Hertz ever discuss with you the question of purchase of Tidewater stock? A. I never had any conversations with Mr. Hertz about the matter at all."

Mr. Levy: (Continuing)

[39] "Q. At the time that Lehman Brothers made the purchase of Tidewater common stock, this common stock was not convertible into preferred stock, was it? A. It was proposed to be converted under an announced plan.

"Q. Can you tell us in what manner the announcement was made, and when such announcement was made? A. It is a matter of newspaper record, that the president of the company gave an interview and there was an official release made by the company."

Deposition of Joseph A. Thomas

Mr. Levy: Page 48, question 1:

"Q. When for the first time, Mr. Thomas, would you say that you learned that Tidewater had in mind a convertibility privilege for common stockholders? A. I can't give you the exact date but I can give you the circumstances.

"Q. I will take that. A. When my fellow director—Mr. John Schiff, again—and I lunched together, and he discussed the plan with me.

"Q. Can you give us a better date than that, than pointing out the circumstances? A. That would be in the—sometime between the date of the meeting and the middle of the month."

[40] Mr. Levy: I would like the defendants to stipulate for the record that that period indicates a period sometime between September 2, 1954, and September 15, 1954.

Mr. Vance: I think the most accurate way of putting that in is to put it in through the depositions which you have taken which pinpoint exactly when those articles appeared in the Wall Street Journal.

Mr. Levy: I am just trying not to clutter up the record as much as possible.

Mr. Vance: I don't think it will clutter up. I think it will clarify the record.

Mr. Levy: Very well. Page 44.

Mr. Vance: You are going back to page 44?

Mr. Levy: Yes. I assume you are willing to adopt the statement made by Mr. Gallantz on page 44, at the bottom of the page?

Mr. Vance: I think this appears clearly, Mr. Levy, as you well know—

The Court: Let's go on.

Mr. Vance:—in the depositions of other witnesses that you took.

The Court: Whether he adopts it or not, it is sworn testimony.

[41] Mr. Levy: Mr. Gallantz, the attorney for Lehman Brothers, stated as follows:

"I have a copy of the Wall Street Journal of September 17, 1954, page 2, which contains an article headed 'Tidewater Oil may issue preferred for part of outstanding common.'"

I will read just the first two paragraphs although the article contains four:

"Tidewater Associated Oil Company is considering a proposal to let shareholders exchange part of their stock for a regular cash dividend paying stock. David T. Staples, President, said the board of directors at a meeting September 2, discussed informally the possibility of making available preferred stock in exchange for a portion of the outstanding common stock."

I would like to stop there, unless you wish me to read the following paragraph.

Mr. Vance: Mr. Levy, I don't care what you read. I think you just ought to put into the record all the facts which relate to this.

The Court: Go ahead, Mr. Levy, you read what you want.

Mr. Levy: Thank you. Now I go back again, [42] your Honor, to page 48 of Mr. Thomas' deposition, in which I asked him:

"Can you give us a better date than that, than pointing out the circumstances," referring to when he learned, when he first learned when—when he first learned that Tidewater had in mind a convertibility privilege for common stockholders, and the question was, question 3:

"Q. Can you give us a better date than that, pointing out the circumstances? A. That would be sometime between the date of the meeting and the middle of the month."

Mr. Levy: And I again ask counsel for the defendants to stipulate that Mr. Thomas' meaning of the date was between September 2nd, the date of the meeting, to September 15, 1954.

Mr. Vance: I don't know what Mr. Thomas' understanding was.

The Court: All right. Well, read the deposition then.

Mr. Levy: Question 4:

"Q. After you learned about this matter, did you discuss it with any members of the Lehman Brothers firm? [43] A. Certainly not."

Mr. Vance: Would you read question 5 there, Mr. Levy, or do you want me to read it?

Mr. Levy: Go ahead.

Mr. Vance: (Reading)

"Q. Did you deem this information confidential? A. Of course."

Mr. Levy: Page 50, question 5:

"Q. When you found out that Tidewater was planning to offer a convertibility privilege to common stockholders, did you attempt to find out whether Lehman Brothers owned any of the common stock? A. I knew what we owned. I think we had 100 shares at that time which the company had owned for a long time, so I didn't make any specific investigation. I knew what they had."

Question 2:

"Q. When for the first time did you find out that Lehman Brothers was going to convert its common stock

into preferred stock? A. As soon as we bought the first shares. They were bought specifically for that purpose.

"Q. Who told you that? A. I don't know. Somebody around the office.

[44] "Q. There was a discussion had with respect to that? A. Well, discussion is too broad a word. I saw large purchases of Tidewater being made and quite properly I said, 'What are we going to do with this?' and they said 'We are going to convert it and sell it because it is a high grade stock and very desirable for institutional investors.' That is, if the plan was approved.

"Q. Can you recall at this time whether you spoke to a partner of Lehman Brothers with respect to that? A. I might have.

"Q. Can you refresh your recollection in any way and tell us who that partner was? A. I really couldn't. There are so many conversations going on in my firm every day that I can't remember them for a week, much less for a couple of years.

"Q. Were any memorandums made of conversations between partners with respect to specific subjects such as the Tidewater purchases and sales? A. To my knowledge, no memoranda were ever made on the subject, at least not by me."

Mr. Levy: Page 95, question 1:

[45] "Q. When for the first time did you become aware of that fact that your firm had begun to sell Tidewater preferred stock? A. As soon as the sheets go over my desk I see the sales.

"Q. And that was within one or two days after the sales? A. That is right. All the partners receive daily a list of the purchases and sales of our customers, and that follows through usually in about 24 to 48 hours. We delay in looking at it because we might be busy.

Deposition of Joseph A. Thomas

"Q. But you were aware of the fact, weren't you, Mr. Thomas, that your firm was purchasing the stock for the purpose of reselling it to institutional investors? A. I was.

"Q. And that its intentions at all times were to convert the common stock into preferred and sell the preferred stock? A. That is right. I was."

Mr. Levy: Page 56 of Mr. Thomas' deposition, question 3:

"Q. Do you know the general practice of Lehman [46] Brothers with respect to their underwriting undertakings? A. Yes.

"Q. Can you give us a brief resume as to how it is done, what is the practice? A. Well, you ask a very broad question.

"Q. I will give you all the time you want to answer that, Mr. Thomas. A. Well, our practice is essentially the same pattern that is observed all over Wall Street. An individual in the firm, partner or non-partner, consults with management of the corporation concerned as to their financial needs, obligations, plans and attempts to work out a suitable deal, usually for the specific purpose of raising money. That you may take any one of the customary forms of securities, debt, debenture, preferred stock or common stock. In the process of negotiation the two parties arrive at a satisfactory price, satisfactory to each of them, and satisfactory in compensation, and you go ahead with the deal. That is oversimplifying it, but that is exactly what occurs.

"Q. In a situation of this kind are discussions also had with a partner who is a director on the [47] particular corporation to whom the underwriting is to be done? A. He is available usually because he knows more about it.

"Q. Has it occurred with you, Mr. Thomas, with respect to Tidewater, that the general partners of Lehman Brothers have discussed with you various phases for underwriting securities for Tidewater?"

Page 59 is the answer on that:

"A. Well, I recall the conversation here shortly after the first of this year when we were contemplating this bond issue. Of course, we discussed it because it involved us taking a commitment of $12 million. That is a matter of the entire firm, whether it is Tidewater or XYZ.

"Q. Since the time you were elected as a director of Tidewater have you discussed with the other members of the firm any underwriting commitments that you may have been intending to go into with respect to Tidewater securities? A. This one I referred to was the only one.

"Q. That is the only one? A. It is the only financing the company has done since I have been a director."

[48] Page 79, question 2:

"Q. Do you recall any conversation with either Mr. Lehman or any other member of your firm where Mr. Hertz' name or the fact that he was leaving Tidewater's board of directors was mentioned? A. Well, not specifically, but Mr. Hertz' retirement from active participation was mentioned a good many times. It was common talk that Mr. Hertz was getting older and he is less active, and we all knew that he would rather go back to his horse farm than spend a lot of time in his business."

Mr. Vance: I have no objection, Mr. Levy, but that is the second time you read it this morning.

The Court: I recognized that.

Mr. Levy: I am sorry.

Page 85, question 3:

"Q. Would it be in order to say that when there is any business connected with the oil business that your advice

would be sought concerning it by Lehman Brothers? A. Sometimes it is. Sometimes not. We have several people that make the oil business their keen interest."

Mr. Vance: Your Honor, I object and move [49] to strike it out on the grounds that it is not relevant to this case.

The Court: I will allow it.

Mr. Levy: (Continuing)

"Q. Can you name any other partners in Lehman Brothers who know as much or practically as much about the oil business as you do?"

Mr. Vance: Same objection.

The Court: Objection sustained.

Mr. Levy: If your Honor please, the reason I am asking these questions is to show the connection that Mr. Thomas had between himself as a director and his partners, and show, by later questions, subject to connection, that he spoke to these men with respect to the business of Tidewater, and since these men were partners in Tidewater—in Lehman Brothers, there is a direct connection here.

The Court: What relevancy has that got to do with the issues pleaded in this case?

Mr. Levy: As I told you your Honor before, the issues with respect to this case is whether or not Lehman Brothers got information or could have gotten information from the director.

The Court: I don't see that you have [50] stated that that is the issue. There is nothing in Section 16(b) of the Securities and Exchange Act which relates to the imparting of confidential information. If you are proceeding on some other theory, then I would like to know it. But we have a very limited issue here, just Section 16(b) of the Securities and Exchange Act.

Mr. Levy: I am proceeding on Section 16(b) of the Securities and Exchange Act of 1945, and I say to your Honor that the courts have strictly enforced Section 16(b), and they have gone out of their way, so to speak, to bring within its ambit any transactions which can or could be covered by it, and whereby any person or any firm could envisage a profit by short swing transactions.

The Court: Where has there ever been a case that a firm, of which a director is a member, has been held liable under Section 16(b)?

Mr. Levy: This is the first case of its kind, your Honor, except the case of *Ratner v. Lehman* and in that case no connection was attempted to be shown.

The Court: In *Ratner* they held that the statute did not allow liability to be recovered [51] against the partnership.

Mr. Levy: And in that case, your Honor, no connection was sought to be shown between the partners and the director with respect to the business of the corporation in which the director was on, and here we actually are showing that.

The Court: I sustain an objection to the question of who were the experts on the oil business in Lehman Brothers.

Mr. Levy: Page 86, question 2:—I assume, your Honor, that I don't need to ask for an exception, that I get it automatically.

The Court: You get it automatically.

Mr. Levy: (Continuing)

"Q. During your term of office as a director of Tidewater have any of your partners in Lehman Brothers ever approached you and told you that they would like certain things to be done in Tidewater to further the interests of Lehman Brothers? A. No, certainly not.

Deposition of Joseph A. Thomas

"Q. Have they discussed the various business interests that Tidewater has and the probability of its success or the chance of profit? A. No. I have been asked from time to time [52] what I thought of the management not only by people of my own firm, but outsiders as well. But that is a common question directed at directors of most corporations.

"Q. You have been asked by certain members of your firm what you thought of management? A. Yes.

"Q. And what you thought of the policies that they were formulating? A. That is right.

"Q. And what your opinions were concerning the effect they would have upon the business? A. That"—

Mr. Vance: The objection was interposed there, at the time of the deposition, your Honor, that the question presumed that as though Mr. Thomas had been testifying to discussions of specific policies.

The Court: I will overrule the objection and let him give whatever answer he gave.

Mr. Levy: (Continuing)

"A. That question I can't answer.

"Q. I beg your pardon? A. That question I can't answer.

[53] "Q. Can't? A. Can't. I have answered in the affirmative that I have said that I thought the management was good and I thought their general objectives were first-rate.

"Q. Can you recall with whom you had those conversations? A. No, I can't.

"Q. Was it with one or more of your partners? A. It might have been.

"Q. Was it with Robert Lehman? A. No, I am sure it wasn't with Robert Lehman.

"Q. Was it with Mr. Hertz? A. No, none with Mr. Hertz.

"Q. Mr. Gutman? A. Mr. Gutman I would unquestionably have discussed it, because he is very much interested in the oil business, generally speaking.

"Q. Did you ever have such discussions with Mr. Mazur? A. No.

"Q. Or Mr. Hancock? A. No. He has been ill practically ever since I was a director.

[54] "Q. How about Mr. Hammerslough? A. Yes, I have talked to Bill from time to time about it.

"Q. Mr. Callery? A. Yes, I should have mentioned Mr. Callery. Mr. Callery is very knowledgeable of the oil business. I should have mentioned him before.

"Q. Mr. Ehrman? A. I don't think I have ever discussed Tidewater with Mr. Ehrman.

"Q. Mr. Fell? A. Yes.

"Q. Mr. Glazier? A. No.

"Q. Mr. Isles? A. No.

"Q. Mr. Kahn? A. No.

"Q. Mr. Kennedy? A. Yes.

"Q. Mr. Manheim, Frank or Paul? A. Paul, yes; Frank, no.

"Q. Mr. Natelson? A. No.

[55] "Q. Mr. Szold? A. No.

"Q. With whom do you say you had most extensive conversations concerning these matters? Which of these gentlemen? A. Gutman, Hammerslough and Kennedy.

"Q. Were these gentlemen members of the committee of Lehman Brothers as you mentioned who selected various investment portfolios for Lehman Brothers? A. Kennedy certainly not. Mr. Gutman was at one time, and Mr. Hammerslough I think has been a member of the portfolio committee right along."

Mr. Levy: Question 7, same page:

"Q. Did you at any time discuss with any of these gentlemen the advisability of your firm, Lehman Brothers,

purchasing stock in Tidewater? A. No, not as a firm investment. I have suggested from time to time that I thought Tidewater under the new management was an attractive investment.

"Q. You had suggested that to— A. Not only to individuals of my own firm but to a great many people on the outside, because that is my belief.

"Q. But you had suggested that to members of [56] your firm and told them that it would be a good investment for them? A. When the new management came in, my opinion was asked of what I thought of it, and after I watched them in, I expressed my opinion freely that I thought the management was first-rate, that the company would do well under that management.

"Q. Now, you say your opinion was asked about it? A. Yes.

"Q. Who asked your opinion concerning that? A. Some of the gentlemen that you mentioned.

"Q. These gentlemen? A. That ordinarily follow the oil industry. They are interested in all major oil companies.

"Q. Did you at any time during your discussions with any of these gentlemen go into the business of Tidewater specifically with respect to the profit angle, in other words, that it was a good investment for a short term investment on a long term investment? A. I never discussed that angle of the thing at all. I simply told them what I considered the long-range aspects of a new management of a going major oil company. I never discussed the operating details of this company with any of my partners."

[57] Mr. Levy: That concluded the testimony of Mr. Thomas, your Honor.

Mr. Vance: If your Honor will give me a moment, there are a few things that I want to read to clarify what Mr. Levy has already read.

The Court: All right. Go ahead.

Mr. Vance: Mr. Carlson, will you turn to page 36 of Mr. Thomas' deposition, question 1:

"Q. Do you recall, Mr. Thomas, prior to the purchase of the common shares of Tidewater, any discussion with the members of Lehman Brothers had with respect to that purchase? A. No.

"Q. You do not recall anything? A. No.

"Q. Concerning any discussions? A. No. You are talking about the firm now?

"Q. Members of the firm. I am talking about the firm, I am talking about individuals as well. A. I understand you correctly. No.

"Q. If you talked to Mr. Hertz or you talked to someone, Mr. Lehman, that is a discussion with a member of the firm, and that is what I am trying to elicit from you. [58] A. No, we had no such discussions.

"Q. Did you personally talk to any members of the Lehman Brothers partnership with respect to the purchase? A. No.

"Q. Do you know of any members of the Lehman Brothers partnership discussing it amongst themselves when you were not present? A. Not to my knowledge.

"Q. When was the first time you knew that a purchase had been effected of Tidewater common stock? A. When I saw the sales sheets. I see the sales sheets that go through, the purchase and sales sheets of the firm.

"Q. How long after the actual purchase would you say that was? A. I usually see it the following day, if I look at it. My secretary gets it the following day."

Mr. Vance: I believe that is all, but please give me one more moment to check, your Honor.

Your Honor, there is one more item that I am eventually going to read from Mr. Thomas' deposition with respect to the waiver of any profit

which the firm of Lehman Brothers might make in [59] connection with the purchase and sale of Tidewater securities, and I am prepared to read it in at this time.

The Court: All right.

Mr. Levy: If your Honor please, I will object to any testimony with respect to any type of waiver, supposed waiver, as being self-serving, and if there is any non-payment of profits I want that proven. I don't want a statement—

The Court: Who did he waive it to?

Mr. Vance: He waived it to his partners and to the world, and he so stated on the form fours which were filed with the—

The Court: You mean he was entitled to a certain profit but he says "I won't take it"? "Give it to my partners"?

Mr. Vance: He said, "I want no part of the transaction." He realized no profit, your Honor.

The Court: Well, I doubt very much—from a tax standpoint I should think he realized a profit and gave it away.

Mr. Vance: I don't believe so, your Honor.

The Court: I think from a legal standpoint, if he is entitled to the profit, the mere fact that he [60] said, "Well, I won't take it, give it to my partners," doesn't make any difference.

Mr. Vance: None of his money was put at risk in connection with the purchase. He had no connection at all with the transaction.

Mr. Levy: The partnership funds were.

Mr. Vance: But not his funds.

The Court: Well, I don't know what the nature of the waiver is. I thought you meant that after the transaction was all over he simply said, "Well, I won't take my share of the profits."

Mr. Vance: No, sir. I would like to read this now. This is information which Mr. Levy listed in his deposition, and I think it should be read in at this point.

The Court: All right. Go ahead and read it.

Mr. Levy: If your Honor please, I object to that as being immaterial, irrelevant and also on the ground that it is hearsay, and objectionable on that ground.

The Court: We will see what appears.

Mr. Vance: Mr. Carlson, will you turn to page 87?

Mr. Levy: I assume it is understood that [61] I object to the reading of any questions with respect to the waiver.

The Court: You can't object until I hear the question. I can't rule on it until I know what the questions are.

Mr. Vance: I want to point out that these questions Mr. Levy himself asked of the witness.

The Court: I know. But he can still object to his own questions if he wants to. But I can't rule until I see the ball coming across the plate.

Mr. Vance: (Reading)

"Q. Mr. Thomas, I show you Plaintiff's Exhibit 1, for identification, and ask you to read the statement made at the bottom of the transactions"—

Mr. Levy: If your Honor please, I object to that as being hearsay.

The Court: Objection sustained. What is on a statement he doesn't have to read. It is a written document and speaks for itself.

Mr. Vance: This I offer in evidence, your Honor.

Mr. Levy: I object to that.

The Court: Is this part of your defense?

Deposition of John Hertz

Mr. Vance: This has been marked in connection [62] with Mr. Thomas' deposition as Plaintiff's Exhibit 1 for identification.

The Court: We are holding it for your part of the case then. I won't take it now.

Mr. Vance: Well, your Honor, in light of that ruling I respectfully except, and I will defer my whole life of questioning which I was going to read from that deposition until a later time.

The Court: All right.

What is your next thing?

Mr. Vance: That is all I have on Mr. Thomas' deposition, your Honor.

Mr. Levy: I should like to read at this time from a deposition taken of the defendant JOHN HERTZ on October 10, 1956. Page 112, question 1:

"Q. What is your name and address? A. John Hertz, 880 Fifth Avenue, New York. That is my New York address.

"Q. Are you a partner of Lehman Brothers?"—

Mr. Vance: Read question 2.

Mr. Levy: (Continuing)

"Q. What is your permanent residence, Mr. Hertz? A. Cary, Illinois.

"Q. Are you a partner of Lehman Brothers? [63] A. I am.

"Q. How long have you been a partner of Lehman Brothers? A. Since 1934, 22 years.

"Q. Were you ever a director of Tidewater? A. Yes.

"Q. Can you give me the dates when you first became a director and when you ceased being a director? A. It must have been during the year 1934 or 1935, and I ceased being a director—I don't remember the date—

I would say within the last six, seven, eight or nine months, somewhere in there."

Mr. Levy: Would counsel for the defendants stipulate that Mr. Hertz ceased being a director of Tidewater on August 5, 1954?

Mr. Vance: I would stipulate that his resignation was accepted as of that date, but I believe his resignation was submitted a good deal earlier. Would you so stipulate?

Mr. Levy: I have no knowledge as to when his resignation was submitted. All I am asking you to stipulate is when did his resignation from the board of Tidewater become effective.

The Court: I take it it is August, 1954.

[64] Mr. Levy: Yes.

Page 113, question 1:

"Q. Can you state the circumstances of your becoming a director of Tidewater? A. Mr. William Humphrey was the president of Tidewater at the time. He and I had been personal friends for many, many years before that, and when he found that I had joined Lehman Brothers he asked me would I like to be a director of Tidewater and, of course, I was pleased to say yes.

"Q. Did you discuss your proposed nomination as a director with any members of Lehman Brothers at the time?"

Mr. Vance: Your Honor, I object to this. It seems to me this whole line of questioning is irrelevant.

The Court: Overruled. He can answer.

Mr. Levy: (Continuing)

"A. That was a long time ago.

"Q. Yes, I know. A. I don't remember any more. I suppose I gossiped about it.

Deposition of John Hertz

"Q. Prior to your election as a director of Tidewater or while you were such a director, rather, was there any other partner of Lehman Brothers ever a director of Tidewater? [65] A. Not to the best of my recollection, no.

"Q. So that at all times you were the only partner of Lehman Brothers who was a director of Tidewater? A. That is right.

"Q. I understand that Lehman Brothers has various departments which handle different phases of its business. Now, do certain of its partners handle business in a specific department? A. Well, I don't know. I am not familiar enough with the inside workings of Lehman Brothers to answer that truthfully and correctly. I am not really a banker. I came here as a salesman. I came here to bring business to Lehman Brothers, and I devoted my time to it, and you may not believe it but I have never been on any floor of this building excepting this floor, the eighth floor, where the restaurant is, and the downstairs where the cashier is. I have never been on any other floor of these buildings."

Mr. Vance: Your Honor, it seems to me this is going very far afield, and I must object.

The Court: Even though Mr. Hertz didn't get very far afield. I will allow him to answer.

Mr. Vance: May I have a continuing objection to this line of questioning?

[66] The Court: Oh, yes. Sure. What difference does it make?

Mr. Levy: (Continuing)

"Q. Would you say that your being a director of Tidewater brought business to Lehman Brothers? A. I am sure it did. It surely brought Tidewater business.

"Q. I understand that Lehman Brothers customarily has weekly meetings of its partners. Have you attended

any of these meetings? A. Whenever I am in town I do."

Question 4:

"Q. Prior to your resignation, Mr. Hertz, when you attended meetings of Lehman Brothers, do you recall ever having any discussions with some of your partners concerning some of the affairs of Tidewater? A. Oh, I probably gossiped about it with them.

"Q. Were there also discussions with respect to other corporations of which certain of the partners were directors? A. Probably, but I don't remember them. Before I go any further, I want to tell you that I am hard of hearing, you know, and until I got this hearing aid, attending these partner meetings was just to be [67] present. Unless I sat up close I couldn't hear the talking."

Question 2:

"Q. At the time of your resignation or prior to your resignation from the board of Tidewater did you have any discussion with any of your partners concerning that fact? A. Why, I undoubtedly gossiped a little about it and told them that I was going to get through. I didn't want to work any longer.

"Q. Can you name some of the partners you gossiped with? Can you remember some of them? A. I can't remember that; there was no secret around it. Everybody knew I wanted to get out. I wanted to resign at the same time altogether.

"Q. In the course of your gossiping with your partners was there a discussion as to getting another member, one of your partners, in your place on the board of Tidewater? A. No, I just resigned and after I resigned I made some recommendations to different people whose boards I had left.

Deposition of John Hertz

"Q. After you resigned, as you stated, did you make any recommendations with respect to having [68] Mr. Thomas, one of your partners, come on the board of Tidewater in your place? A. Yes, I spoke to the president of the Tidewater Company in my last meeting with them and told them that I had a very smart young partner who knew much more about the oil business than I did. I didn't know anything about it, only what I heard around the boards, and suggested that they might be interested in taking him on. He asked me who it was and I gave him his name, and that is the last I had to do about it, excepting that Mr. Thomas told me that the president, Mr. Staples, had called him up.

"Q. At that time, when you recommended to Mr. Staples that Mr. Thomas be nominated a director of Tidewater, was there a discussion had between your partners as to the advisability of Mr. Thomas going on the Tidewater board? A. There might have been, but I wasn't in. I didn't hear any more about it.

"Q. You did have a discussion with Mr. Thomas, though, didn't you? A. Yes. I asked him whether he would like to go on the board, and he said he would.

"Q. Did you tell him that he could further the [69] interests of Lehman Brothers? A. No.

"Q. By being on the board of Tidewater? A. He is smart enough. I didn't have to tell him anything like that. He is a smart fellow."

Mr. Levy: Page 120, question 2:

"Q. At any time, Mr. Hertz, while you were a director of Tidewater did occasions arise when one or more of your partners or one or more of the employees of Lehman Brothers would discuss Tidewater affairs with you or secure advice with respect thereto? A. Nobody has ever had the nerve to ask my advice on any—in any company where I was sitting on the board of direc-

tors. That just isn't done. I might have gossiped with somebody, but I don't recollect these things. Nothing of any seriousness surely."

Page 122, question 2:

"Q. Is it the practice of Lehman Brothers to have some of its partners go on boards of corporations in order to further the interests of Lehman Brothers?"

Mr. Vance: Objection, your Honor.
The Court: Overruled. He may answer.
Mr. Levy: (Continuing)

"A. Well, I surely joined Tidewater Company [70] thinking it was going to be in the interests of Lehman Brothers.

"Q. Did you recommend Mr. Thomas for the same reason? A. No, I recommended—well, I—I might have. It probably did involve that, but the main reason was that I was a large shareholder of Tidewater, a real large stockholder from the day I became a director, and for the general welfare of the company I thought a man like Thomas would do them a lot of good and do Lehman Brothers no harm."

Page 127, question 2:

"Q. I assume, Mr. Hertz, that at the time you were a director of Tidewater you were pretty familiar with its affairs. A. I attended all the meetings that I possibly could and listened carefully.

"Q. When for the first time did you find out that Tidewater intended to issue a proposal wherein the common stock would be converted into preferred stock? A. Oh, there were several discussions about the stock procedure during that time, but at the time of my resignation nothing had been done regarding it. It was still being discussed. A lot of different [71] plans of financing the new refinery and so on.

"Q. Did you ever discuss any of these plans with any of your partners? A. Nothing in any way except maybe a gossiping way.

"Q. Well, let's take the word 'gossip.' A. Well, I—when you sit around with all these men and lunch together every day you are liable to talk about anything. I don't remember that. Nothing of any seriousness, surely, because the Tidewater Corporation was controlled by one man. He owned the majority of stock, and that is all there is to it. We tried to advise him. We tried to advise the president to the best of our ability."

Page 130, question 3:
Mr. Vance: Read question 2, please.
Mr. Levy: (Continuing)

"Q. Mr. Hertz, during your term as a director of Tidewater did it ever occur or one of your partners approach you in the course of conversation and told you that it might be advantageous to Lehman Brothers firm if certain things were done by the board of directors of Tidewater? A. Never. Nobody has on any corporations that I have ever been a director of.

[72] "Q. Were you ever asked by any of the partners of Lehman Brothers what you thought of Tidewater's management or its prospects? A. Oh, I probably gossiped about it."

Mr. Levy: Question 1, page 131:

"Q. Do you recall the substance of your gossip? A. Well, a lot of different things were gossiped about, the controlling ownership, Mr. Getty's, the fact that he and Mr. Humphrey were having some difficulties, had some difficulties; nothing that was—in which Lehman Brothers had any particular business.

Deposition of John Hertz

"Q. Now, particularly during the latter part of 1953 or 1954 just prior to your resigning from the board, do you recall any such discussion with any of your partners as to the management of Tidewater or its prospects? A. No, I never discussed any of that stuff with any partners. I might have talked about it but there was no discussion because we had nothing to say about it."

Mr. Levy: I am finished with Mr. Hertz' testimony.

Mr. Vance: If your Honor would give me one moment, I want to see if there are some things that [73] Mr. Levy has omitted.

In light of your Honor's ruling on some of the questions which Mr. Levy has propounded here to the witness, I ask him to turn to page 121, question 4:

"Q. Have any of the partners of Lehman Brothers ever made suggestions that some of the partners or one or more of the partners should attempt to be placed upon the board of directors of any particular corporation? A. Not to me."

Mr. Vance: Please turn to page 123, question 2:

"Q. Did you know that Lehman Brothers sometime in 1954 had purchased 50,000 shares of Tidewater common stock? A. Not until Mr. Gallantz told me.

"Q. That was the first time you had knowledge of that? A. Positive.

"Q. And there was never any discussion between your partners with respect to the purchase of Tidewater stock by Lehman Brothers? A. I never even heard a whisper of it. When I go away from here I am not likely to."

Mr. Vance: I believe that is all, your Honor.

Deposition of William J. Hammerslough

[74] Mr. Levy: If your Honor please, I would like to read from the deposition taken of the defendant WILLIAM J. HAMMERSLOUGH on April 10, 1957.

Page 3:

"Q. What is your full name and address? A. William J. Hammerslough, 930 Park Avenue, New York City.

"Q. Are you a partner of Lehman Brothers? A. I am."

Mr. Vance: You might as well run down to the bottom of the page.

Mr. Levy: (Reading)

"Q. How long have you been a partner? A. I think I have been a partner since 1930, about 27 years.

"Q. Were you ever a director or officer of Tidewater? A. No, never.

"Q. Does Lehman Brothers trade in securities for its own account? A. Yes."

Mr. Levy: Question 3:

"Q. Does Lehman Brothers underwrite securities for corporations, of which one or more of its partners are [75] either officers or directors?"

Mr. Vance: Objection.

The Court: Overruled.

You may answer.

"A. You mean have they done so?

"Q. Yes. A. Yes.

"Q. In such instances is Lehman Brothers a manager of the underwriting group?"

Mr. Vance: Your Honor, do I have a continuing objection to this line of questioning?

The Court: Yes. I will allow it.

"A. Oh, yes. Not in all cases, but in many cases.

Deposition of William J. Hammerslough

"Q. Would you say that in most of the cases where Lehman Brothers had a partner on the board of a corporation, and in which it was an underwriter, Lehman Brothers was a manager, or one of the managers, of the underwriting group? A. I couldn't answer that exactly, but there have been cases, many cases, where we have been.

"Q. It has been testified on prior examinations of your partners that Lehman Brothers customarily has weekly meetings of its members. At these meetings, has there ever been any discussion with respect to [76] having one or more of your partners seek representation on the board of directors of any corporation? A. Well, the word 'seek'—I would say this in answer to that question: When we have done, on occasion, a new issue of securities to the public, the company has sometimes asked the partnership of Lehman Brothers whether so-and-so would come on the board.

"Q. Can you expand on that, Mr. Hammerslough? When you say they have asked so-and-so, you mean one of your partners, to come on the board? A. Yes."

Mr. Levy: Page 7, question 4:

"Q. Have you ever discussed Tidewater's affairs with Mr. Thomas? A. Well, we discussed the fact that we were a—in an underwriting of Tidewater, in a bond issue, headed by Eastman, Dillon, I think it was—this latest issue of Tidewater bonds.

"Q. Did you ever have any discussions with Mr. Thomas in 1954, after he had become a director of Tidewater, concerning the affairs of Tidewater? A. I know this, that Thomas spoke very highly of the management and prospects of the Tidewater Oil [77] Company. I believe he thought very highly of it."

Deposition of William J. Hammerslough

Mr. Levy: Page 9, question 4:

"Q. Between October 8, 1954, and November 15, 1954, Lehman Brothers purchased 50,000 shares of the common stock of Tidewater for its own account; is that correct? A. Subject to checking the dates, yes.

"Q. Who authorized such purchase? A. I believe I authorized the purchase.

"Q. Do you have a Portfolio Committee which is in charge of authorizing purchases and sales of stock for Lehman Brothers of its own account? A. Yes, we did have at that time."

Mr. Levy: Question 4:

"Q. Now, in 1954, when Lehman Brothers purchased the 50,000 shares of Tidewater's common stock, who besides yourself were members of the Portfolio Committee? A. As I remember it, the members of the Portfolio Committee were myself, William Glazier, a partner, and Stuart Shotwell. They were the formal members, but all other partners were invited at times to attend the meetings, and it wasn't necessarily always confined to just those three persons."

Mr. Levy: Page 12, question 1:

[78] "Q. In 1954, what were the duties of the Portfolio Committee? A. The duties?

"Q. Yes. A. Well, I would say in general that it was a sort of a watchdog of the portfolio, and if the committee came up with any ideas, they would report them and possibly take some action on them, and if they thought something was very attractive, they might buy a certain amount of it, or they might sell something."

Mr. Levy: Page 15, question 3:

"Q. Was there a discussion between members of Lehman Brothers concerning the advisability of Lehman Brothers

purchasing 50,000 shares of Tidewater's common stock? A. There certainly was.

"Q. Where did this discussion take place and who attended it? A. I don't remember exactly where it took place, but it took place in our offices here, either one office or another. And to the best of my recollection Mr. Glazier was at that meeting and we invited Mr. Herman Kahn, a partner of Lehman Brothers, whose judgment we admired, to join in that discussion."

[79] Mr. Levy: Question 4:

"Q. Can you tell us what the discussion was at this meeting between yourself and Mr. Glazier and Mr. Kahn concerning the advisability of purchasing Tidewater common stock? A. Well, we both had—we, all of us, had the feeling, I believe, that this preferred stock into which the common was going to be exchanged subject to the approval of whatever the statement in the paper said, would be a very, very safe, good investment, and would be attractive, once it was issued, to institutional investors throughout the country."

Mr. Vance: Before you leave that page, Mr. Levy, I may have misunderstood you, but I believe you left out questions 2 and 3. If you did, I would like you to please read them in.

Mr. Levy: You can read them.

Mr. Vance: (Reading)

"Q. Did you at any time call Mr. Thomas in to discuss this purchase of 50,000 shares of Tidewater common stock? A. I don't recollect doing so.

"Q. Did you ever personally discuss with Mr. [80] Thomas the advisability of purchasing 50,000 shares of Tidewater stock? A. I do not recollect doing so."

Deposition of William J. Hammerslough

Mr. Levy: Page 17, question 3:

"Q. At this discussion among Mr. Kahn, Mr. Glazier and yourself, did you also discuss the fact that you contemplated converting these common shares of Tidewater stock into its preferred shares? A. Yes.

"Q. When issued? A. Yes."

Mr. Vance: Would you read the next question, please?

Mr. Levy: You can read it.

Mr. Vance: (Reading)

"Q. Did any one of these partners state that he had spoken to Mr. Thomas? A. No."

Mr. Levy: Page 24, question 6:

"Q. How long, Mr. Hammerslough, would you say that you and your partners, or the members of the Portfolio Committee, kicked around this idea of purchasing Tidewater stock before you actually gave this order to Mr. Levy to purchase it for you? [81] A. To the best of my recollection, not too long in time.

"Q. Well, was it one day? A. Something like that."

Mr. Levy: I have nothing further to read from Mr. Hammerslough's testimony.

Mr. Vance: If your Honor would give me a moment, I would like to check to see if there are any other questions which are required to be read.

In light of your Honor's rulings admitting certain testimony there are certain additional questions which I feel are necessary to ask here or to read here.

Would you turn to page 6, question 5:

"Q. Did you have any discussions with your partner, Joseph A. Thomas, relating to his election as a member on the board of Tidewater? A. None.

"Q. You never spoke to anyone concerning his getting on Tidewater's board? A. I never did.

"Q. Prior to his— A. No.

"Q. Prior to his being elected? A. No."

[82] Mr. Vance: Would you turn to page 8, question 2:

"Q. A little while back we were discussing the weekly meetings of Lehman Brothers. A. Yes.

"Q. At these meetings was Mr. Thomas present? A. At every meeting?

"Q. At most of these meetings. A. I think when he was in town and available he was there, yes.

"Q. At these meetings, was there at any time a discussion of the management or business affairs of Tidewater which might be applicable to the business of Lehman Brothers? A. Not to my knowledge.

"Q. Prior to Mr. Hertz' leaving the board of directors of Tidewater, did you ever have a discussion with him concerning the affairs or management or business policies of Tidewater?, A. No.

"Q. At any time did you have any discussion with any of your partners concerning the advisability of having one of them take Mr. Hertz's place on Tidewater's board? [83] A. I never did.

"Q. Do you know of any such discussion between any of your partners? A. No, I do not."

Mr. Vance: Page 13, top of the page, question 1:

"Q. When, for the first time, did the Portfolio Committee discuss the purchase by Lehman Brothers of 50,000 shares of Tidewater common stock? A. You mean when was the first time?

"Q. Yes. A. As far as I remember, there was an article —I read the Wall Street Journal very religiously when I am working here—and that has been a long time— and

I remember that after this announcement was made that we had a discussion about this situation."

Mr. Levy: We read that before.

Mr. Vance: I don't believe it was read. I would like to read it again.

"Q. Are you referring to any specific date in the Wall Street Journal? A. I haven't got the date before me, no.

"Q. Can you tell us what the substance of that article was? [84] A. Well, to the best of my recollection it was a statement—well, it would be easy, would it not, to get the Wall Street Journal of about that particular time and show you the article, because I can't quote it word for word?

"Q. Do you recall what the substance is? I am not asking you to quote it word for word. Do you know approximately what it said? A. Well, that they were calling a meeting—this is my recollection—to discuss offering an exchange of Tidewater stock for a new $1.20 preferred stock."

Mr. Vance: Page 20, question 2:

"Q. Mr. Hammerslough, I show you a copy of an article from the Wall Street Journal dated September 17, 1954, and I ask you whether you saw that article. A. Yes, I believe I did see that one.

"Q. Is that the article you refer to? A. I don't know. I would have to see the other article."

Mr. Vance: Mr. Levy, would you stipulate that the two articles from the Wall Street Journal which were marked as exhibits for identification are the articles referred to in Mr. Hammerslough's testimony?

[85] Mr. Levy: Yes, the articles that were marked for identification in Mr. Hammerslough's testimony are the articles referred to here.

Mr. Vance: Would you stipulate their admission in evidence?

Mr. Levy: I don't see the relevancy of the articles themselves. I have no objection as to dates, stipulating as to the date when the articles appeared.

Mr. Vance: Well, you have referred to them yourself previously. I am merely trying to clarify the record.

Mr. Levy: If you want to put them in, you can put them in. There is no objection to that.

The Court: They will be received in evidence as Defendants' Exhibits A and B.

(Marked Defendants' Exhibits A and B, respectively, in evidence.)

[86] Mr. Vance: Page 21, question 2:

"Now, Mr. Hammerslough, I show you an article from the Wall Street Journal dated October 8, 1954, and ask you whether you saw that article. A. Oh, yes, I saw this article.

Mr. Vance: Now, if you would turn to page 29, question 3.

"Q. Has it been customary, Mr. Hammerslough, for your firm to deputize one of your partners to go on the boards of certain corporations with which you were doing business, or contemplating doing business? A. I would say no."

Mr. Vance: That is all, your Honor.

Mr. Levy: I should like to read from the deposition of the defendant MONROE C. GUTMAN taken on October 24, 1956, page 3:

"Q. What is your full name? A. Monroe C. Gutman.

"Q. Your address? A. 480 Park Avenue.

"Q. Are you a partner of Lehman Brothers? A. I am.

"Q. Has your firm had any business dealings with Tidewater Associated Oil Company? [87] A. I think they participated in an issue for the Tidewater Oil Company some time in the last year or so. I don't know exactly when it was."

Mr. Levy: Question 6:

"Q. Prior to this past year, have you had any business dealings with Tidewater? A. In the past we did some financing for them, I believe."

Mr. Levy: Page 5, question 4:

"Q. How long have you been with Lehman Brothers? A. I think it was about 1924. It is about right within a year or so."

Mr. Levy: Page 9:

"Q. Mr. Gutman, do the partners of Lehman Brothers have weekly meetings? A. We usually have meetings at luncheon, on Monday.

"Q. Who are present at those meetings? A. All the partners that are in New York that aren't otherwise occupied."

Mr. Levy: Page 10, question 5:

"Q. Can you tell us what happens at the meetings, at these weekly meetings, of the partners of Lehman Brothers? [88] A. Any partner that has anything that he thinks is important, from the point of view of a firm deci-

sion, tries to get the judgment of the other people as to what should be done."

Mr. Levy: Page 12, question 6:

"Q. How long do you know Mr. Thomas? A. For a great many years.

"Q. Have you ever discussed any of Lehman Brothers' business with him? A. I discuss Lehman Brothers, at times, with any of my partners.

"Q. Did you ever discuss any Tidewater business with him? A. No, not directly with him."

Mr. Levy: Page 14, question 6:

"Q. Who in your organization was assigned to the Tidewater financing business? A. In Tidewater financing business, it was done by Mr. Thomas. I think he was assisted by some of the staff. He probably had assistance from other partners, too. I don't know the details. As a rule, he is apt to have.

"Q. Did he discuss these matters with the other partners? [89] A. I don't remember the details, Mr. Levy, but I am sure, before undertaking a commitment for the firm to do public financing, it was discussed at a partners' meeting. Frankly, I don't remember that discussion, but I think it probably was.

"Q. Who was in charge of"—

Mr. Vance: Just a second, your Honor. I am not objecting to this line of questioning because I assume your ruling with respect to the other depositions would carry over here and that I have a continuing exception.

The Court: Yes.

Mr. Levy: (Reading)

"Q. Who is in charge of assigning one or more of the partners of Lehman Brothers to a particular piece of

business with a firm or corporation? A. Well, if a piece of business comes up, it usually comes to some part of the firm and is automatically handled by the person it comes to. If it comes to the firm out of a clear sky, then it is assigned, as a rule, by Mr. Robert Lehman. If it is some piece of business that we have not been familiar with before.

"Q. Is it usually assigned to that particular partner who is a director in the company? [90] A. That doesn't follow, it depends upon the type of financing; but it is very likely. He certainly would be one of those who would be consulted. He would be consulted, because he would be cognizant of what is going on.

"Q. Would such director at all times be a member of the committee handling such negotiations? A. I wouldn't want to make a statement, 'at all times.' He would be very likely to be, I think."

Mr. Levy: Question 3:

"Q. I say where Lehman Brothers' partners are directors on corporations and your firm has had financing or other business dealings with such firms, has it ever occurred, within your knowledge, that that particular director of the corporation was not in on the discussions and negotiations, except where such partner was sick? A. No, I would say that I think that has happened where the director of the corporation may be there at the very initial preliminary meeting when nothing is developed, when one or more of the younger members of the staff attend to the thing from that point on.

"Q. Let me get this clear, Mr. Gutman. Is it your testimony, then, that the director of the corporations with which Lehman Brothers has business [91] dealings usually is in on discussion, whether it be initial or throughout the negotiations? A. I think the director will certainly initially be in on the discussion; but from that point on,

in some cases, he will have practically nothing to do with it."

Mr. Levy: Page 19, question 1:

"Q. Mr. Gutman, does your firm have a policy of having members of your firm, or your partners, go on the various boards of directors of companies? A. We have no definitive policy. We do it at times and at times we don't."

Mr. Levy: Page 20, question 1:

"Q. In other words, when you have them go on boards, you suggest that they go on boards; is that correct? A. Not always.

"Q. There are some times when you do? A. There are times when it has been suggested; yes, that is correct."

Mr. Levy: Page 27, question 3.

Mr. Vance: Before you get to that, would you just read question 3 on page 20 from which you were just reading? Or do you want me to read it?

Mr. Levy: Yes, you read it.

[92] Mr. Vance: (Reading)

"Q. I assume the reason for that is that it benefits Lehman Brothers? A. No, sir, I don't believe it is. I think the reason for it is because we figure from the point of view for the company and the point of view for the investors."

Mr. Levy: Page 27, question 3:

"Q. Did Lehman Brothers ever make any request to any corporation with whom it had done business to have representation on its board of directors? A. I would assume that we have. I am just assuming that. I can't recall a particular instance. Certainly, over the years, it has taken place.

"Q. Have you, Mr. Gutman, personally been elected as a director of a corporation pursuant to such request made by either you or other members of your partnership? A. I was elected director of certain companies, way back in the twenties, at the request of Herbert Lehman, and when he went into political life and succeeded."

Mr. Levy: Page 29, question 2:

"Q. You stated that your firm did financing for Tidewater last year. Did Mr. Thomas bring that up for discussion before the members of Lehman Brothers? [93] A. I don't remember specifically that he did, but I think it is almost a fair assumption that he would have."

Mr. Levy: I have nothing further to read from the testimony of Mr. Gutman.

Mr. Vance: If your Honor will bear with me a moment.

Would you turn to page 14, question 1:

"Q. Did you ever discuss with Mr. Thomas his going on the board of the Tidewater Company? A. No, I haven't.

"Q. Did you ever discuss with any partner in Lehman Brothers the fact that Mr. Thomas was proposed for the board of Tidewater? A. No.

"Q. Have you ever heard such discussion in your presence between any partners of Lehman Brothers? A. I have not."

Mr. Vance: Page 29, question 1:

"Q. Within your knowledge, Mr. Gutman, has Mr. Thomas ever brought up for discussion at these meetings of your firm matters pertaining to Tidewater affairs? A. No, not as to the company's affairs. When it had to do with financing it would be brought up by [94] him to be discussed. As to what is going on in the company, we

have a number of directors on boards. That type is not brought up for discussion."

Mr. Vance: That is all, your Honor.

Mr. Levy: I would like to read from the deposition of the defendant WILLIAM S. GLAZIER taken on September 12, 1957.

Page 3, question 1:

"Q. Will you please state your full name and address? A. William S. Glazier, 127 East 80th Street, New York 21.

"Q. In what capacity are you connected with Lehman Brothers? A. I am a general partner.

"Since when have you been a general partner? A. January 1, 1940.

"Q. Do you know Mr. Thomas? A. Yes.

"Q. I understand from prior examinations of your partners that Lehman Brothers has a portfolio committee. A. That is correct.

"Q. In 1954 were you a member of the portfolio [95] committee? A. I think so, yes.

"Q. What were your duties in connection with being a member of that committee? A. Well, it is a very informal committee. The portfolio committee meets usually once a week, and sometimes acts on its own initiative, sometimes consults with the other individual members of the firm or the entire partnership and in general supervises the marketable security holdings of Lehman Brothers and buys or sells accordingly.

"Q. Is that portfolio committee in charge of purchasing securities for Lehman Brothers or directing the purchase of such securities? A. They purchase, they direct, and they advise. There is no cleavage. It depends upon individual cases.

"Q. In 1954, are you aware that Lehman Brothers purchased 50,000 shares of the common stock of Tidewater Associated Oil Company? A. I am."

Mr. Levy: Question 3, page 5:

"Q. Did you have a discussion prior to your purchase of these securities? A. Oh, yes, that is right.

[96] "Q. And you discussed the matter with which of your partners? A. With Hammerslough and, I believe, with Herman Kahn, and there may or may not have been others; I wouldn't know.

"Q. Do you remember when for the first time you had such discussion? A. Well, I know that there was a discussion on the day the purchases began. Whether there were any discussions prior to that time, informal or not, and this is a very informal committee, I don't know. This was a matter that was known to us all, I mean in a general way."

Mr. Levy: Page 14, question 1:

"Q. Do you know the circumstances under which Mr. Thomas became a director of Tidewater? A. He was invited on the board.

"Q. What knowledge do you have concerning that? A. Nothing other than the fact that he was invited on the board and accepted.

"Q. Did he tell you about that? A. It was common knowledge around the office here. I don't know whether he told me specifically."

Mr. Levy: I have no further questions in [97] Mr. Glazier's deposition.

Mr. Vance: Your Honor, there are certain parts which I feel are necessary to be read to clarify what has already been read.

The Court: All right.

Mr. Vance: Would you turn to the top of page 6, question 1:

"Q. Can you explain in what manner it was known to all of you? A. Well, prior to the initiation of the purchases there was a public statement, I believe in the Wall Street Journal some two or three weeks prior to that, that the directors of Tidewater Associated were considering an exchange of preferred stock for common stock, a voluntary exchange.

"Q. Was that the first time that you knew that Tidewater was considering an exchange of its common for preferred stock? A. That is correct, when the newspaper articles appeared. Whether there were more than one or not I don't know.

"Q. Who first brought it to your attention? A. I read the Wall Street Journal. I presume that I brought it to my own attention.

[98] "Q. On the day you read this article in the Wall Street Journal did you have a discussion with any of your partners or employees? A. I haven't the least idea."

Mr. Vance: Question 3 at the bottom of page 7:

"Q. Mr. Glazier, I assume that you read the Wall Street Journal every day. A. Yes.

"Q. Did you come across an article in the Wall Street Journal concerning these very facts written some time in September of 1954? A. Well, the date we are talking about of the initial purchases, as I recollect the record, was October 8th, and I said it was a couple or three weeks before that, so it must have been September. I don't remember the date.

"Q. Do you remember how many of these articles concerning these facts you read in the Wall Street Journal prior to Lehman Brothers commencing its purchases of Tidewater stock? A. No, I do not. I remember that there were at least two, the one which we have been talk-

ing about here and a second one which I believe its appearance [99] was the same day as the initial purchase, which was to the effect that the Tidewater directors had approved the exchange of stock which would be submitted to the stockholders, I believe for stockholders' vote."

Mr. Vance: Turn to the bottom of page 11, question 2:

"Q. I show you, Mr. Glazier, Plaintiff's Exhibit 1 for identification and ask you whether you read this article in the Wall Street Journal. A. I believe so.

"Q. On the date it was published? A. I believe so.

"Q. And that date is September 17, 1954? A. September 17, 1954.

"Q. My question addressed to you, Mr. Glazier, is, after reading this article, Plaintiff's Exhibit 1, on September 17th did you have a discussion with any of your partners concerning these facts? A. I think I answered that, but I remember no specific discussion, but I wouldn't doubt at all that there had been some.

"Q. How long after reading this article was a direction given to purchase Tidewater stock for Lehman Brothers? [100] A. The direction to purchase Tidewater stock had nothing to do with this article. The direction to purchase Tidewater stock was after it was officially announced that the directors had approved making an exchange plan, putting an exchange plan up for a vote by stockholders.

"Q. Do you recall the date of that? A. Just by reference to this, which is October 8th.

"Q. I show you Plaintiff's Exhibit 2 for identification and ask you whether you read this article dated October 8, 1954. A. I believe so.

"Q. After reading this article did you have discussion with any of your partners? A. We did.

Q. With whom did you discuss the facts? A. With Hammerslough and Herman Kahn, and there may or may not have been others.

"Q. How soon after reading this article was a direction given to purchase this stock, the Tidewater stock? A. The same day. I don't know what the time lapse was after reading the article and after the direction was given."

[101] Mr. Vance: Your Honor, the exhibits which were referred to in the testimony which we have just read as Plaintiff's Exhibits 1 and 2 for identification are those which have been marked Defendants' Exhibits A and B in evidence.

Would you now turn to page 20, question 2:

"Q. After Mr. Hertz resigned from the Tidewater board did you or any members of your firm in your presence or to your knowledge suggest to Mr. Thomas that he attempt to be elected as a director of Tidewater? A. No.

"Q. Was any discussion had concerning Mr. Thomas going on the Tidewater board? A. Not to my recollection.

"Q. Did you ever discuss the matter with Mr. Hertz? A. No."

Mr. Vance: Page 21, question 5:

"Q. Prior to the purchase of the Tidewater stock in 1954 did Mr. Thomas to your knowledge discuss the matter with any members of your Portfolio Committee or any other partners of your firm? A. No.

[102] "Q. Do I understand your answer 'No' to mean that you do not know? A. No, he did not discuss it to my knowledge with any members of the Portfolio Committee, certainly not with me."

Mr. Vance: That is all, your Honor.

The Court: We have about reached time for lunch, I guess, so we will stand adjourned until 2:15.

(A luncheon recess was taken until 2:15 P. M.)

[103] Afternoon session.

2:15 P. M.

The Court: I don't think we have to wait for Mr. Hays to come back from lunch. His interest in this litigation is somewhat academic, I should say, so if you want to you can proceed.

Mr. Levy: Very well.

If your Honor please, I would like to read into the record certain admissions made by the defendant, and I refer specifically to item No. 40 of plaintiff's notice to admit.

"That on December 8, 1954, the defendants Lehman Brothers converted 50,000 share of the common stock of Tidewater Associated Oil Company into 50,000 shares of its $1.20 cumulative preferred stock."

This item has been admitted by the defendants. Item 41.

"That on December 8, 1954, the market range of the common stock of Tidewater Associated Oil Company was a low of $25 and a quarter per share, and a high of $25 and seven-eighths dollars per share."

The Court: Is the conversion of the stock [104] an important issue in this case?

Mr. Levy: Yes, sir.

The Court: Why?

Mr. Levy: We are claiming that the conversion into the preferred constituted a purchase of preferred stock under the statute, and that thereafter the defendants, within six months, sold the preferred stock realizing a profit from the preferred stock.

The Court: So you are basing this date from this December 8, 1954, date?

Mr. Levy: Yes.

The Court: What were those prices?

Mr. Levy: The common was selling at 25-1/4 low and at 25-7/8 high, and, of course, the reason, as you Honor well knows, why I am mentioning the common stock range is that under the cases the purchase price of the preferred is computed by what is given up for it, and in this case it is the common stock.

Mr. Vance: Your Honor, we object to this request on the ground that it is not relevant. It is our position that if there is any relevant period, it would be the period and the times and the purchase prices when the common stock was initially purchased and not [105] the date on which a conversion was made.

The Court: I understand. I will take the evidence anyway.

Mr. Levy: Item No. 42.

"That between December 9, 1954, and March 8, 1955, inclusive, the defendants Lehman Brothers sold 50,000 shares of its $1.27 cumulative preferred stock of Tidewater Associated Oil Company realizing net proceeds therefrom in the sum of $1,361,186.77."

That is admitted by the defendants.

Item No. 5 of the notice to admit.

"That for some time prior to, on or about December 6, 1954, the defendant John M. Hancock was a member of the board of directors of Jewel Tea Company."

That is admitted.

Mr. Vance: Objection, your Honor.

The Court: What relevancy does that have?

Mr. Levy: I am trying to show the plan or scheme showing that the defendant Lehman Brothers had a plan wherein they placed various of its directors upon the boards of various corporations—

The Court: That, I think, is completely [106] irrelevant. You are relying upon a statutory remedy here. You have elected to proceed on a statutory remedy.

Mr. Levy: May I, your Honor, read to you from the SEC position with respect to a partnership and with respect to the statute where the statute Section 16(b) of the statute says that "A director or an officer must account to his corporation for any short swing profits."

The Court: That is correct.

Mr. Levy: Now the word "director", your Honor, is defined in the statute under Section 3(a), subdivision 7, and it says "The term 'director' means any director of a corporation, or any person performing similar functions with respect to any organization whether incorporated or unincorporated."

The Court: I am well acquainted with that provision, but I don't see why we have to bring the Jewel Tea into something related to Tidewater Oil.

Mr. Levy: Well, it is our position, your Honor, that the close relationship between Joseph A. Thomas and his partners was such as to constitute them collectively, Lehman Brothers collectively, a person within the meaning of Section 3(a)(9) of the Securities [107] and Exchange Act of 1934, and, therefore, Lehman Brothers was

actually the director under the statute of Tidewater within the meaning of Section 16(b), and we are trying to show the general conduct of Lehman Brothers with respect to not only Tidewater but with respect to other corporations also.

The Court: Well, I am not going to take the fact that somebody who was a director of the Jewel Tea Company is any relevant proof in this case.

I will sustain the objection to that.

Mr. Levy: I have a whole line of admissions here similar in nature. I would like to read them into the record, and if your Honor sustains any objections there is nothing I can do about it.

The Court: You want to prove that partners of Lehman Brothers were directors of various corporations.

Mr. Levy: I want to prove that they were partners of various corporations and that as soon as one partner left as a director of a corporation Lehman Brothers had another partner go on the board of that same corporation. I want to prove a systematic course of conduct with respect to many corporations in which Lehman Brothers had its partners.

The Court: I am ready to assume that a number [108] of members of Lehman Brothers were directors of various corporations. I don't think you need to get any admissions of that. I think the Court can practically take judicial notice of that fact.

Anything other than that you will have to prove.

Mr. Levy: All right. That is what I am attempting to prove, your Honor. I am attempting to prove that with respect to certain corporations—

The Court: Go ahead and offer what your proof is, then.

Colloquy

Mr. Levy: "That for some time prior to on or about December 6, 1954, the defendant John M. Hancock was a member of the Board of Directors of Jewel Tea Company."

Mr. Vance: Objection.

The Court: Strike it out; completely irrelevant.

All right. Next question.

Mr. Levy: "That the defendant John M. Hancock resigned as a director of Jewel Tea Company, Inc. on or about Deecember 6, 1954."

Mr. Vance: Objection.

The Court: Strike it out. It is irrelevant.

Mr. Levy: "That on or about December 6, 1954, [109] the defendant Harold J. Szold was elected as a member of the board of directors of Jewel Tea Company, Inc. and has been a director of said corporation to the present time."

Mr. Vance: Objection.

The Court: Strike it out; irrelevant.

Mr. Levy: "That in its proxy statement dated February 25, 1955, Jewel Tea Company, Inc. made the following statement: 'Mr. Szold was elected a director by the other members of the board to fill the unexpired term of John M. Hancock who resigned as of December 6, 1954, after 35 years of service on the board. Mr. Szold became associated with Lehman Brothers in 1924 and has been a partner of the firm since 1941.'"

Mr. Vance: Objection.

The Court: I will let that stand.

Mr. Vance: Then read the answer.

The Court: Is that the answer?

Mr. Carlson: That was not admitted.

Mr. Vance: That was not admitted in those words.

Mr. Levy: The defendants, with respect to plaintiff's item 8, "Admit that Jewel Tea Company, [110] Inc. issued a proxy statement dated February 25, 1955, but deny that the statement contained in item of said notice to admit constituted the entire proxy statement."

Mr. Vance: Your Honor, I make the further objection that what is stated in the proxy statement of the Jewel Tea Company is not binding on these defendants, besides being irrelevant.

The Court: It is not binding on the defendants; but, if Mr. Levy wants that particular part in, I will let it stay. I don't see that it has any relevancy whatsoever to the issues Mr. Levy has presented.

Mr. Levy: May I continue, your Honor?

The Court: Go ahead.

Mr. Levy: Item No. 9 in the plaintiff's notice to admit:

"During the periods in which the defendants John M. Hancock and Harold J. Szold, respectively, were directors of Jewel Tea Company the defendants Lehman Brothers have served said corporation in various financial capacities and have received payments for said services."

Mr. Vance: Objection.

[111] The Court: I will sustain any objection to an answer to that. It seems to me it is completely irrelevant.

Mr. Levy: The defendants—

Mr. Vance: It was sustained.

Mr. Levy: Item No. 10 in the plaintiff's notice to admit:

"That for some time prior to his death in the latter part of 1956 the defendant John M. Han-

cock was a member of the board of directors of the International Silver Company."

Mr. Vance: Objection.

The Court: I think that is completely irrelevant. I will sustain the objection.

Mr. Levy: Item No. 11:

"That on or about February 27, 1957, the defendant Frank J. Manheim was elected as a member of the board of directors of the International Silver Company and has been a director of said corporation to the present time."

Mr. Vance: Objection.

The Court: That is completely irrelevant. I will disregard that.

Mr. Levy: Item No. 12:

[112] "That in its proxy statement dated March 14, 1957, the International Silver Company made the following statement: 'The persons mentioned in the following table constitute the present board of directors elected by the stockholders last year except for Messrs. Frank J. Manheim and Ernest S. Wilson who were elected directors by the board in February, 1957, to fill the vacancies created by the deaths of Messrs. Everett C. Stevens and John M. Hancock. During the last five years Frank J. Manheim has been a partner in the firm of Lehman Brothers."

Mr. Vance: Objection.

The Court: I think that is irrelevant. They have to state what his connection is in a proxy statement.

Mr. Levy: Item No. 13:

"That during the periods in which the defendants John M. Hancock and Frank J. Manheim, respec-

tively, were directors of the International Silver Company the defendants Lehman Brothers have served said corporation in various financial capacities and have received payments for such services."

Mr. Vance: Objection.

The Court: I will sustain the objection. [113] It is irrelevant to the issues of this particular litigation. It might be relevant in another litigation, but not this.

Mr. Levy: Item No. 14:

"That for some time prior to on or about December 30, 1952, the defendant Robert Lehman was a member of the board of directors of General Cigar Company, Inc."

Mr. Vance: Objection.

The Court: I will sustain the objection.

Mr. Levy: Item No. 15:

"That the defendant Robert Lehman resigned as a director of General Cigar Company, Inc. on or about December 30, 1952."

The Court: I will sustain an objection.

Mr. Levy: Item No. 16:

"That on or about December 30, 1952, the defendant Harold J. Szold was elected as a member of the board of directors of General Cigar Company, Inc. and has been a director of said corporation to the present time."

The Court: Objection sustained.

Mr. Levy: Item No. 17:

"That in its proxy statement dated March 2, 1953, [114] General Cigar Company, Inc. made the following statement: 'H. J. Szold was elected a di-

rector of the third class of the company on December 30, 1952, to succeed Robert Lehman for the remainder of the term of directors of that class expiring in 1954. Mr. Lehman served as a director until the end of the year 1952. Both Mr. Lehman and Mr. Szold are partners of Lehman Brothers.'"

Mr. Vance: Objection.

The Court: I will let that stand.

Mr. Levy: Item No. 18—

Mr. Carlson: If your Honor please, we have not admitted that statement. These are requests for admission which are being read.

The Court: What is the answer to them?

Mr. Levy: With respect to item No. 17, the defendants stated as follows:

"Admit that General Cigar Company, Inc. issued a proxy statement dated March 2, 1953, but deny that the statement contained in item 17 of said notice to admit constitutes the entire proxy statement."

The Court: I think that is a ridiculous response to that. You neither admit nor deny, so [115] I will take the demand for admission in that particular item as admitted.

Mr. Levy: Item No. 18:

"That during the periods in which the defendants Robert Lehman and Harold J. Szold, respectively, were directors of General Cigar Company, Inc. the defendants Lehman Brothers have served said corporation in various financial capacities and have received payments for such services."

Mr. Vance: Objection.

The Court: Objection sustained.

Mr. Levy: Item No. 19:

"That during some part of 1950 and for some time prior thereto the defendant Paul M. Mazur"—

The Court: How many of these do we have to go through?

Mr. Levy: Just about ten more.

Mr. Vance: Through 39, your Honor. We are now at 19.

The Court: Why don't you make an offer of proof that the members of the board of directors of various corporations were partners in Lehman. I am perfectly willing to assume that that is so.

[116] Mr. Levy: My offer of proof, your Honor, would be that my notice to admit has requested the defendant Lehman Brothers to admit that with respect to at least ten corporations mentioned therein partners in Lehman Brothers were directors in that corporation, and that as soon as such partner resigned from the board of such corporation another member of Lehman Brothers became a director in said corporation, and that during the period during which the partners of Lehman Brothers were directors in these corporations Lehman Brothers served them in various financial ways and received commissions and other remuneration therefor.

I make such offer of proof in my notices to admit and the answers thereto.

Mr. Vance: The notices to admit and the answers thereto certainly do not establish what Mr. Levy says he would intend to prove.

The Court: Isn't it true, and can't we say, that it is agreed for the purpose of the record that Lehman Brothers have various partners who served on boards of directors of ten different cor-

porations other than Tidewater Oil; that when one of those partners resigned in those ten cases that another partner of Lehman Brothers became a director of the particular [117] corporation?

Is that disputed?

Mr. Vance: Well, I don't know exactly how many cases there are, your Honor. But, if there is any suggestion that this is due to something on Lehman Brothers' part and not to a decision on the part of the directors of the company on whose board he went, then I would have objection to it.

The Court: Well, I realise that, but I don't think that that is comprehended in any of these questions. This is merely an historical statement of what actually happened. I think Mr. Levy would have to prove, if he wants to prove, that Lehman Brothers was responsible for this. He has not asserted that in any of these questions so far.

Mr. Levy: My offer of proof, your Honor, was to show a general course of conduct of Lehman Brothers with respect to these corporations and to show that such conduct carried over.

The Court: A course of conduct does not prove that Lehman Brothers was responsible for that situation.

Mr. Levy: No, but it is one way of showing that a certain thing was done, and we are trying to prove here that Lehman Brothers deputized and designated [118] Joseph Thomas to be on the board of Tidewater Oil Company.

The Court: So far none of your proof has established that, and I believe that merely the fact that they had certain directors on the boards does not prove that they were responsible for it.

You are falling into that logical fallacy of *post hoc, ergo propter hoc*: because something follows, therefore it is because of.

It isn't necessarily so. If you want to prove Lehman Brothers was responsible for these people being elected on the board, you have to prove that by evidence. I am perfectly willing to assume, on the basis of your offer of proof, from what I have heard already that certain partners of Lehman Brothers were directors of various corporations; when certain of those directors resigned other directors were elected who were partners of Lehman Brothers.

Mr. Levy: My further offer of proof, your Honor, is to show that Lehman Brothers served the corporations upon whose boards their members were directors in various financial capacities and earned fees and other remunerations.

The Court: That I am perfectly willing to [119] say I will accept as being established, but I think it is completely irrelevant, and therefore I strike it out of consideration in this case.

It might be relevant in another type of case. There may be a conflict of fiduciary duty there, but I am not dealing with that because that is not the complaint which is made in this case.

I don't see any necessity of going through 29 or 39 more demands for admission and the answers to them to establish something concerning which there can be no substantial dispute. The conclusion, however, I think is disputed by Mr. Vance.

Mr. Levy: Well, I assume, then, your Honor, that I need not proceed any further with respect to these items.

The Court: No, I think not.

Mr. Levy: And that I have made my offer of proof thereof.

May I offer pursuant to the suggestion of Lehman Brothers' counsel, the plaintiff's notice to admit dated—

Colloquy

The Court: How do you want to offer it, as an exhibit?

Mr. Levy: Yes.

[120] The Court: No. That is a pleading. It is part of the court record.

Mr. Levy: In view of the fact that there has been a stipulation entered into which preserves the right of the defendants to object to any of the items, can it be construed a pleading?

The Court: Well, the demand to admit is nothing other than a form of pleading. You read the demand. You read the admission or the denial of it. It isn't a piece of evidence in and of itself any more than a complaint or an answer is.

Mr. Levy: Well, I understand from the defendants' counsel that he is willing to have these items put in as exhibits.

Mr. Vance: No, I didn't say that.

The Court: They are part of the court record. They will be taken like the pleadings as part of the court record, of course.

Mr. Vance: My objection, your Honor—I hope that my objection is registered to each and every one of these which he is now offering to prove.

The Court: On the ground that they are irrelevant?

Mr. Vance: On the ground that they are [121] irrelevant, yes, your Honor.

Mr. Levy: Your Honor, that winds up the plaintiff's case with the exception of proving the percentage of interest which Mr. Thomas had in the Lehman Brothers partnership during the period December 8, 1954, through March, 1955, and I now request counsel for the defendants to state on the record what such interest was at that time.

Mr. Vance: If your Honor please, I will describe it to the best of my ability as I understand it.

Mr. Thomas was entitled to share in 4 per cent of the first 47.05 per cent of any profits which were realized. He was then entitled to share, on the basis of 1.85 per cent, in the remaining profit realized by the firm.

The Court: What was that first number? 4 per cent of what?

Mr. Vance: 4 per cent of 47.05.

And then in 1.85 per cent of 53.95, if my arithmetic is correct.

Mr. Levy: You mean the balance, the remaining balance of 53.—

Mr. Vance: Excuse me for a minute.

[122] Mr. Levy: 52.95.

Mr. Vance: I am 1 per cent over. He shares on the basis of 1.85 per cent of the balance.

The Court: Which is 52.95.

How does he share in the losses?

Mr. Vance: On the same basis.

The Court: Does he have any other interest in the partnership?

Mr. Vance: That is all, your Honor.

The Court: All right. Now, have you anything else, Mr. Levy? You haven't proved what the profits were that were attributable to Mr. Thomas.

Mr. Levy: Your Honor, I believe that from the admissions we have the following facts emerging which are indisputable, and that is that between December 8, 1954, and March, 1955, Lehman Brothers purchased and sold 50,000 shares of Tidewater preferred stock.

Now, on the date on which they converted their common into preferred, which we maintain is a

purchase under the cases, the common stock was selling for 25-1/4 to 25-7/8 dollars per share.

Now, in view of the fact that the purchase price of the preferred would be measured by the value [123] of the common given up, and in view of the further fact that Section 16(b) of the Securities and Exchange Act attempts to squeeze all profits out of stock transactions, it is submitted that we take the lower market figure of the common stock, or 25-1/4 dollars per share for the purchase price of the preferred stock, so that each share of the preferred stock at 25-1/4 dollars would add up to $1,262,500 for the purchase of 50,000 shares of Tidewater preferred.

Now, it has been stipulated that the defendants received the net sum of $1,361,186.77 from the sale of the preferred stock, leaving a profit realized in the sum of $98,686.77, for which the plaintiff, your Honor, seeks judgment with interest from March 8, 1955.

The Court: Is there any dispute about those figures, Mr. Vance?

Mr. Vance: Your Honor, as I previously indicated, it is our position that there was no purchase on December 8th, such as Mr. Levy asserts.

Secondly, your Honor, there has been no proof that Mr. Thomas realized any profits.

The Court: Let us break it down. In the first place, have you got any authority on the question [124] as to whether a conversion of stock may be regarded as a purchase?

Mr. Vance: Yes, sir, and I put them in my pretrial memorandum.

The Court: Now, is there any dispute that if you take the date of December 8th as the date of purchase, that the Lehman Brothers made a profit of $98,686.77?

Colloquy

Mr. Vance: Your Honor, I have not done the mathematics on that. If you will give me just a second I will do that very thing.

(A pause)

Mr. Vance: Subject to computation, your Honor, I don't want to hold you up, I will assume for the time being that his mathematics is correct.

The Court: All right. Now, where is the proof as to how much Mr. Thomas made, Mr. Levy?

Mr. Levy: If your Honor please, it has just been stipulated that Mr. Thomas owned a 4 per cent interest in the first 47.05 per cent of the profit of Lehman Brothers.

Now we are proceeding on the fact that not only is Mr. Thomas' direct interest in Lehman Brothers recoverable, but that the entire profit realized [125] by Lehman Brothers is recoverable under the statute, and if your Honor will bear with me for just a moment, I would like to read to your Honor and quote from an SEC position with respect to partnership short swing profit. And I am quoting:

"It is not disputed that Section 16(b) reaches transactions by a partnership, a partner of which is a director (or other insider) of the issuer of any equity security registered on a national securities exchange. 'For the purpose of preventing the unfair use of information which may have been obtained by such . . . director,' Section 16(b) provides that 'any profit realized by him' from short swing trading 'shall ensure to . . . to the issuer.' The dispute is whether the language 'any profit realized by him' covers only the director's beneficial interest in any partnership profits, or the entire profit realized by the firm in which he had an undivided interest."

The Court: What did they decide on that?

Mr. Levy: Well, they decided that it should reach the entire interest of the partnership, but in view of the fact that they had a certain rule requiring the disclosure of a partnership's interest at that time, [126] they went along with the court in that only the proportionate share of the partner's interest should be recoverable in that case, but now—

The Court: Are you establishing what that is in this case? Are you seeking a judgment against Mr. Thomas?

Mr. Levy: I am seeking a judgment against both Mr. Thomas jointly and severally.

The Court: Suppose there is no judgment against Lehman Brothers, do you drop your request for a judgment against Mr. Thomas?

Mr. Levy: No, sir. I say to your Honor that in view of the fact that he owned a 4 per cent interest in Lehman Brothers' profits he was a general partner, the minimum, even under the defendants' view, must be 4 per cent of the profits realized by him.

The Court: Not necessarily. I mean, here is a firm where he has a 4 per cent interest in the first 47.05 per cent profit. Now, is this part of the first 47.05 per cent of profit? Is it part of the 52.95 per cent of the profit?

Mr. Levy: That, your Honor, I would not know.

The Court: Well, it is your case, not mine.

[127] Mr. Levy: But in view of the court's statement in *Gratz v. Claughton*, 187 F. 2d 46 (C. A. 2, 1951) where certiorari was denied, it is well established that a trustee's firm may not benefit from transactions with the trust. A defendant's misdeeds puts the transactions in such a confused state that we must take the maximum amount that can be recovered.

The Court: There is nothing confused about this. You said had, I suppose, two years, probably, to get this information.

Mr. Levy: Well, I have requested, your Honor, the defendant upon his examination, to state his interest in the partnership, and he has refused to so state, and it is only upon this trial for the first time that I have been apprised as to what his interest was.

The Court: You could easily have come to court at any time and gotten that information. The Court would have directed it from the very beginning.

Now, they also would have made it possible for you to find out how much his interest was in these profits. I am not going to surmise as to what it was. The books of the partnership must show what it was.

[128] Mr. Levy: All you have to prove, your Honor, I believe, is that that partnership realized the profit.

Now, it is up to the defendant's director to show that the amount of profit with respect to him must be less. I don't believe, your Honor, that it is up to me prove what his proportionate interest in the partnership was.

The Court: Then it may be that we cannot enter any judgment against him individually if we cannot enter it against the firm.

Mr. Levy: Of course, I press my—

The Court: Due to the fact that you have not got the necessary information in preparation for the trial.

Mr. Levy: Of course, your Honor, I press the fact that we request judgment here against the Lehman Brothers partnership for the full amount

of the profit on the ground that the Lehman Brothers partnership as an entity was a director within the meaning of the—

The Court: You don't mean the Lehman Brothers was a director, do you?

Mr. Levy: Was an entity and as an entity was [129] a director, that's right, within the meaning of the statute, your Honor.

The Court: Did Lehman Brothers file the reports of purchases and sales like directors have to do on listed securities?

Mr. Levy: The directors file the purchases and sales indicating how many purchases and sales were effected by Lehman Brothers during the periods in question.

The Court: As an affiliate of the person, I suppose.

Mr. Levy: That is correct.

May I read just a couple of pages of—

The Court: Is it in your brief?

Mr. Levy: No. I would like to have that on the record, and perhaps your Honor would be helped by it with respect to the SEC's thinking in this matter.

The Court: I would be very glad to have it in written form.

Mr. Levy: Well, it is very short.

The Court: An SEC release, is it?

Mr. Levy: No. It is an SEC statement released in the case of *Ratner v. Lehman Brothers* [130] in 1951.

The Court: That is not necessarily a view of the SEC, if it is a brief written by some lawyer employed by the SEC in a particular case.

I am perfectly willing to look at an SEC order, or things like that, but I am not ready to take all the effusions of their counsel.

Colloquy

Mr. Levy: May I, your Honor, make a statement, then, adopting for myself what the SEC said in its brief, just a short statement, and perhaps then I can put this in a different light?

The Court: Why not put it in your brief so that I will have it when I can examine your case?

Mr. Levy: If your Honor would like me to do that, I will. I thought perhaps by reading it—

The Court: All right, go ahead and read it.

Mr. Levy: The SEC said as follows:

"Section 16(b) declares the provision for the surrender of profit to be 'for the purpose of preventing the unfair use of information which *may* have been obtained' through an inside relationship to the issuer (emphasis supplied). It was intended to operate irrespective of actual proof of abuse of inside information. Congress, [131] recognizing that the specified relationships commonly carry with them access to inside information but that proof of abuse in the particular case would be very difficult, thought that elimination of the profit motive would have the effect of 'preventing' insiders 'from speculating in the stock on the basis of information not available to others' and that the provision would 'render difficult or impossible the kind of transacations which were frequently described to the committee, where directors and large stockholders participated in pools trading in the stock of their own companies, with the benefit of advance information • • •

"To construe Section 16(b) as not reaching, under any circumstances, more than the partner's proportionate interest in a firm transaction is to both to adopt an unrealistic conception of the nature of a partner's interest in profit realized by

the firm, where the partner may have been instrumental in enabling the firm to profit, and to strip most of the force from a statutory sanction which was intended to completely eliminate the profit motive for such transactions. Where [132] the partnership does obtain inside information from the director-partner which might otherwise tempt it to engage in a short-swing trade, the possibility of being required to surrender a portion of the profit, measured by the individual interest of the director-partner, would neither operate as an effective deterrent to the firm, nor deter the director-partner from passing on inside information to his firm.

"We believe that the individual partner has an undivided interest in the entire firm profit. This is traditional partnership law. It also makes practical sense in the context of Section 16(b). Thus, even though the partner surrenders to the issuer a sum measured by his proportional interest in the firm profit, there can remain many ways in which he would benefit from the profit which the firm would retain. A crude illustration would involve a practice of mutual sharing of inside information by members of a partnership with representation upon a number of boards of directors. The firm could thereby speculate extensively upon the basis of information derived in various situations where members of the firm might be represented on the boards [133] of the issuing companies, surrendering merely a fractional interest in the profit corresponding to that of the interests in the firm held by the particular partner involved. Quite apart from such an exclusive arrangement for sharing the prequisites of inside information, it may be generally assumed

that partnership participations are adjusted from time to time to reflect what each partner contributes to the firm, taking into account services, connections and other intangibles as well as concrete investment.

"Moreover, it seems clear that Congress, in enacting Section 16(b), did not intend to impose lower fiduciary standards than would apply in its absence. See *Gratz v. Claughton*, 187 F. 2d 46 (C. A. 2, 1951) certiorari denied by the United States Supreme Court. It is well established that a trustee's firm may not benefit from transactions with the trust. Similar considerations should be here applicable."

The Court: I take it, however, that that brief was submitted to the Court of Appeals, was it not?

Mr. Levy: Yes, sir.

The Court: What happened?

[134] Mr. Levy: It was submitted as *amicus curiae* by the SEC.

The Court: The Court of Appeals did not accept that argument?

Mr. Levy: No. The Court of Appeals decided it on a different basis, your Honor.

The Court: They did not accept the argument that the profits of the firm could be recovered in this type of action, did they?

Mr. Levy: As your Honor knows, the Court of Appeals stated that no proof had been offered by the plaintiff that any of the partners had actually given any information or received any information from the partner directors.

In this case we have attempted, and I think that we have proven that information has been

passed on by Mr. Thomas to various members of the partnership, and that they purchased the common stock which they thereafter converted into preferred stock on the basis of such information.

The Court: I don't understand that you have established that at all.

The facts as shown here would indicate that they purchased it because of articles appearing in the [135] Wall Street Journal, but, as I understand it, the Court of Appeals in the *Ratner* case simply held that the profits of the firm did not have to be accounted for, that despite anything that the SEC may have said.

Judge Learned Hand, in his concurring opinion, said that the only question in the case is whether partners are liable for whatever profit the firm may make whenever one of their members is a director only because he is a director. He says that he agrees that 16(b) does not go so far.

Mr. Levy: If your Honor will read the majority opinion by Judge Swan I think he has something to say with respect to partnership too.

He say, I believe, that in certain instances partnerships may be held.

Mr. Vance: Mr. Levy, I don't believe that is what the opinion says.

Mr. Levy: Well, I think the Judge can well decide what it says.

Mr. Vance: He certainly can.

The Court: The majority opinion says that Section 16(b) contains no provision requiring the partners or the directors to account for the profits [136] realized by them. It says, the appellant argues that to construe the section so literally as to exclude them leaves a dangerous loophole in the statute, but the legislative history indicates

that the admission of any provision for such liabilty was intentional.

It seems to me that despite whatever the SEC may have said in an abortive brief it may have filed with the Court of Appeals, this court is bound by what the Court of Appeals said.

In the *Ratner* case the Court of Appeals, with your brief and the SEC brief before it, concluded that Section 16(b) does not mean that partners of a director are liable for profits made by them. Maybe Congress left a loophole in the statute, but it is not the power of this court to enact legislation to correct loopholes. And as far as I can see, you have established no proof as to what the profit of Mr. Thomas was in this particular transaction.

Mr. Vance: Have you completed your case, Mr. Levy?

Mr. Levy: Yes, I think I have finished my case.

Mr. Vance: Your Honor, I move to dismiss under Rule 41(b) first as to defendant Lehman Brothers [137] and all of the partners other than Mr. Thomas on the ground that as a matter of fact and law there is no liability with respect to Lehman Brothers or any of the partners other than Mr. Thomas out of any profit which may have arisen out of the transaction in connection with the Tidewater stock, and I specifically rely on the decision of the Court of Appeals in the case of *Ratner v. Lehman.*

I also move to dismiss as against defendant Thomas on the ground that Mr. Thomas would only be liable if it had been shown that he realized a profit. That is the specific wording of Section 16(b).

I submit, your Honor, that there has been absolutely no proof that Mr. Thomas realized any profit, and that therefore the action must be dismissed as to him.

And finally, your Honor, Mr. Thomas could have no liability in so far as any profits which the partnership might have realized under the doctrine set forth in the opinion in *Ratner v. Lehman*.

I therefore move to dismiss both on behalf of Lehman Brothers and all of the partners who are named as defendants in the action.

The Court: You don't think that Mr. Thomas [138] made any profit on this transaction at all?

Mr. Vance: No, sir.

The Court: Well, if it were stipulated that Lehman Brothers made $98,686 profit, then Mr. Thomas, I suppose, made some profit.

Mr. Vance: No, sir, he made no profit.

The Court: I will grant your motion in so far as it dismisses the action against Lehman Brothers other than Mr. Thomas.

As to Mr. Thomas, I am still somewhat puzzled on the facts as to whether he has or has not made a profit as to which he must account.

Mr. Vance: Are you reserving decision on that, your Honor?

The Court: I will reserve decision and let you put in any proof you wish.

Mr. Vance: Your Honor, I would like to call Mr. Isidore Monblatt to the stand.

Isidore Monblatt, for Defendants, Direct

ISIDORE MONBLATT, called as a witness, having been first duly sworn, testified as follows:

Direct Examination by Mr. Vance:

Q. Mr. Monblatt, where do you live? A. 1562 East 4th Street, Brooklyn, New York.

[139] By whom are you employed? A. Lehman Brothers.

Q. In what capacity are you employed by Lehman Brothers? A. I am assistant to the comptroller.

Q. How long have you held that position? A. Since 1952.

Q. What are your duties as assistant to the comptroller? A. My regular duties are to prepare the Federal partnership tax returns, the State partnership tax returns, the Unincorporated Business tax report, gross receipts tax, and to distribute the profits to the partners.

Q. What do you mean by "to distribute the profit to the partners"? A. At the year end I prepare the computations to distribute the firm's profit to the partners.

Q. Were your duties the same in 1954 and 1955 as you have just described? A. Yes.

Q. Mr. Monblatt, I show you a document and ask you whether you recognize it? A. Yes, I do.

[140] Q. Would you tell me what it is? A. This shows the distribution on the sale of 1,400 shares of Tidewater Associated preferred in 1954.

Q. Who prepared that document? A. I did.

Q. Did you prepare it yourself or did you have someone else prepare it for you? A. No, I prepared it myself.

Mr. Vance: Your Honor, I would like to offer this in evidence as Defendants' Exhibit C.

The Court: Show it to Mr. Levy.

Mr. Vance: Yes, I have got a copy here for both the Court and for Mr. Levy (handing).

Mr. Levy: If your Honor please, I object to this document being offered in evidence on the ground that there is no proof here that the shares involved in the present lawsuit are part and parcel of this document.

The Court: Are these the shares that Mr. Levy has been talking about, Mr. Vance?

Mr. Vance: They are. Let me ask a question of Mr. Monblatt.

Q. Mr. Monblatt, does this document reflect the [141] sales of all shares of Tidewater stock by Lehman Brothers during the year 1954? A. Yes, sir.

Mr. Vance: Your Honor, there will be another schedule for 1955, if that is what is puzzling you.

The Court: They sold them in '55, I suppose.

Mr. Vance: They sold some in '54, your Honor, and some in '55.

The Court: Did the profits add up anywhere near the sum that Mr. Levy talked about of some $98,000?

Mr. Vance: No, sir, they did not. And the reason that they did not is that the purchase price is the amount that was actually paid for the shares, your Honor.

The Court: Not the value at the time of the conversion?

Mr. Vance: That is correct, your Honor. The figure that Mr. Levy talks about is a purely theoretical figure which never existed.

Mr. Levy: It is this supposed theoretical figure, your Honor, which was actually taken to compute the purchase price. It is what they gave up, the [142] common stock value that they gave up, that

determines what the price was, what they paid for the preferred stock received, and, therefore, if any other computation is made in this document being presently offered, it is not the proper computation, and I object to it as being offered in evidence.

Mr. Vance: That is a conclusion which you are drawing, Mr. Levy.

The Court: What exactly is this profit of Mr. Thomas here anyway?

Mr. Vance: I will show your Honor through Mr. Monblatt that it is nothing.

The Court: Well, I will reserve decision on the objection first. You better establish what this does show. It is all Greek to me.

Mr. Vance: All right, your Honor.

Q. Now, Mr. Monblatt, will you describe to us what this document is and how you drew it up, and what it shows, starting with the first column. A. First there are the profits that are distributed on two bases, the non-capital basis and the capital basis. On the non-capital basis that is 47.05 per cent. They got the top distribution of the profits. The first distribution made was as to that 47.05. The balance [143] was then distributed on the capital basis.

Intead of distributing on 47.05 I deducted Joe Thomas' percentage, that 4 per cent, and distributed only 43.05 on the first basis. The balance then—

Q. Are you referring to the column headed "Non-capital" in the testimony which you have just given? A. That's right.

Q. Please go ahead.

The Court: What was the profit you were starting with?

The Witness: I started with a book profit of $1,068.73.

The Court: So that is all we are talking about on this then?

The Witness: That's right.

Q. How did you arrive at the book profit which is shown as $1,068.73? A. The cost of the securities—the proceeds, rather, less the cost of the securities, and that left $1,068.73.

Mr. Levy: If your Honor please, I again reiterate my objection. The cost of the securities, by that I assume the witness means the cost of the common [144] securities, the common shares, and that is not the proper basis of computing profits under the case of *Park & Tilford v. Schulte*, and other cases, your Honor.

The Court: You may be right, but let us go ahead with this and see if we can find out what he is talking about.

Q. Go ahead, please. A. The book of $1,068.73—I deducted from that the expenses of 10.30 per cent, which left me a profit figure—

The Court: Where did you get 10.30?

The Witness: 10.30 consists of the state unincorporated business tax, the city gross receipts tax, the employee's profit sharing plan—that is 5 per cent— and there are several employees that share in the profits. The total is 10.30 per cent.

Mr. Levy: If your Honor please, may I say—again, I am sorry to interrupt—that the gross receipts tax and any other tax of whatever nature is not deductible from profit in a Section 16(b) action.

Mr. Vance: We make no contention that it is.

Q. Would you go ahead, Mr. Monblatt. A. That left me a balance to distribute of $958.65 [144-A] from which I distributed 43.05 per cent to the non-capital partners. That left me a balance of $545.93, which I distributed to the capital partners less Joseph Thomas.

[145] Q. Was any part of the $1,068.73 distributed to Mr. Joseph Thomas? A. No.

The Court: Why not? I still don't understand why not. Why wasn't it?

Q. Can you answer that question?

The Court: He had a 4 per cent interest. Why didn't he get 4 per cent of that amount?

A. Well, when I was—

Q. Did you receive any instructions from Mr. Gardner, who was the controller, with respect to what you should do? A. In preparing the SEC form 4 there was a waiver on it, on which Joseph Thomas waives his interest in the purchase of these securities. I make my note from that and when I have any profits to distribute on the sale of those securities I automatically take them out.

The Court: Who gets the profits, the other partners, then?

The Witness: The other partners share a hundred per cent in that profit.

Mr. Levy: If your Honor please, will you tell the witness to speak up, please? I can't hear him.

[146] The Witness: I am sorry.

The Court: What is this waiver you are talking about? This isn't on this document, not on your computation, so you were basing your computation on a waiver which is another document?

The Witness: That's right.

By Mr. Vance:

Q. Mr. Monblatt, I show you several documents which purport to be form 4s filed by or on behalf of Mr. Joseph A. Thomas, and I ask you whether any of those is the document on which you saw the waiver which you have testified about. A. That's right. This is the waiver in which I made my note for the distribution of the profits (indicating).

Q. What document are you referring to? A. The waiver is on—

Mr. Levy: If your Honor please, I object to this evidence on the ground that it hasn't been established that the defendant Thomas waived anything except from what this witness says.

The Court: That is what they are about to try to prove, I gather.

What is this waiver?

[147] The Witness: The waiver is on the form 4 to the SEC.

The Court: Is it signed by Mr. Thomas?

The Witness: It is signed by Mr. Gardner, agent in fact for Mr. Joseph A. Thomas.

Mr. Vance: Your Honor, I will establish through Mr. Thomas, who is now in the court room, what happened with respect to these form 4s. However, Mr. Monblatt was here, and I wanted to get him off the stand and therefore we proceeded with him before Mr. Thomas.

The Court: All right. So in effect all of this computation of the profit on Tidewater means nothing because you say Mr. Thomas did not share in it in any way.

The Witness: That's right. He got no part of it.

The Court: I will sustain the objection at this time.

Mr. Vance: You sustain the objection to the document?

The Court: Yes. It doesn't mean anything as far as Mr. Thomas is concerned.

Mr. Vance: It establishes that he received [148] no part of the profit.

The Court: Not this doesn't; maybe some other document does.

Mr. Vance: Your Honor—

The Court: He himself can testify as to whether he received it. But this document doesn't establish it.

Mr. Vance: Your Honor, this is the man who makes the computations at the end of the year on all of the transactions and credits or does not credit to the various partners' accounts the profits which are earned by the firm. He is testifying that these are the computations which he made and that as a result of the computations which he made in the Tidewater transaction no profit which was realized to Lehman Brothers was credited to the account of Mr. Thomas.

The Court: I understand that. Why do I need all these figures?

Mr. Vance: These are to substantiate that fact, your Honor.

The Court: He says he didn't credit anything to Mr. Thomas. When you get down to it, it isn't because of these figures; it is because of a separate waiver that somebody signed.

[149] Mr. Vance: This will establish the fact, your Honor, that as a matter of bookkeeping within the office of Lehman Brothers the waiver was carried out and that in fact—no money.

The Court: He can so state, but I don't need all those figures about these other partners and all that to establish that fact.

Mr. Vance: Your Honor, I would like to make an offer of proof on that because I believe it may be necessary to do that.

The Court: I am not going to take this miscellaneous lot of figures which can't be explained to my satisfaction.

Mr. Vance: Will your Honor, let me try once again, if I may, to explain this to your satisfaction.

By Mr. Vance:

Q. Mr. Monblatt, what does the figure $1,068.73 show? A. That is the book profit on the sale of 1400 shares of Tidewater preferred.

Q. Is that all of the shares of Tidewater preferred which Lehman Brothers sold during the year 1954? [150] A. Yes.

Q. Was any portion of that profit credited to the account of Mr. Joseph A. Thomas at the end of the year 1954 or at any other time? A. No.

Mr. Vance: Your Honor, I submit this schedule reflects that fact.

The Court: Why not?

The Witness: Well, I base my calculations on—first of all, I saw the waiver that Joseph Thomas—

The Court: Mr. Thomas waived any interest in the profits.

The Witness: —waived any interest in that.

The Court: If he had not waived, he would have received a certain amount of profits, wouldn't he?

The Witness: That's right.

The Court: How much would he have received?

The Witness: Well, he would have received—I can give you a rough calculation of this; I would say about sixty or seventy dollars on the 1400 shares.

The Court: So he waived that.

The Witness: That's right.

The Court: All right. You have your proof.

[151] Mr. Vance: I renew my offer of this document in evidence, your Honor.

The Court: I don't think the document proves anything by itself. I think this witness's testimony proves what you want, not the document.

Mr. Vance: I think it does, too, but I think that the document is important also, your Honor.

The Court: I will sustain the objection.

By Mr. Vance:

Q. Mr. Monblatt, I show you another document and ask you what that is. A. That is the distribution of the book profit of the Tidewater preferred for the year 1955.

Q. Who prepared that document? A. I did.

Q. Did anyone assist you in its preparation, or are those your actual figures on the paper? A. Those are my figures.

Q. Mr. Monblatt, will you tell us how you prepared that document and describe the manner in which the distributions reflected on that sheet were made? A. I took the book profit on the sale of the Tidewater preferred in 1955. I distributed them according to the partnership agreement, omitting Mr. [152] Thomas from my calculations. I distributed the entire profit to all the other partners.

Q. What was the total profit which was being distributed as reflected on that sheet? A. The book profit was $29,318.04.

Q. Was any portion of that profit distributed to Mr. Joseph A. Thomas' account? A. No.

Isidore Monblatt, for Defendants, Cross

Q. Mr. Monblatt, do the computations on that sheet reflect all of the sales of Tidewater preferred stock made in 1955 by Lehman Brothers? A. Yes.

Mr. Vance: Your Honor, I offer this document in evidence.

Mr. Levy: Which document are you offering?

Mr. Vance: The same one. You have it right there.

Mr. Levy: Where is the original?

Mr. Vance: He has it right there.

Mr. Levy: If your Honor please, I object on the same ground as my previous objection.

The Court: Objection sustained. The document means nothing. Mark this as D for identification.

(Marked Defendants' Exhibit D for [153] identification.)

Mr. Vance: Thank you, Mr. Monblatt.

The Court: Any cross-examination?

Mr. Levy: May I reserve my cross-examination?

The Court: If you want a five-minute recess, you can take that, if you want to organize your cross examination.

Mr. Levy: No, I think I can go along with it now.

Cross Examination by Mr. Levy:

Q. Where did you get all these figures from which you read to this Court? A. I took them off the firm's books.

Q. And who put them on the firm's books? A. The accountant in charge—who takes them off the daily blotters.

Q. And do you know how the profits were computed with respect to the Tidewater preferred stock? Are you personally familiar with how it was done? A. Yes.

Q. Can you explain to us how it was done? A. Well, the proceeds less the cost on the books are the profit we distribute.

Q. The cost of what? [154] A. The cost of the—we originally started with the common, converted it into preferred, and transferred our costs to the preferred.

Q. In other words, you used the common stock purchase price as your basis for the cost of the preferred. A. That's right.

Q. You did not use the common stock market range on the date the common was converted as the basis for the preferred stock cost, did you? A. No.

Mr. Levy: That is all.

Mr. Vance: No questions, your Honor.

The Court: You are excused.

(Witness excused)

Mr. Vance: I would like to call Mr. Joseph A. Thomas to the stand.

The Court: We will take a three-minute recess.

(Short recess)

JOSEPH A. THOMAS, having been first duly sworn, testified as follows:

Direct Examination by Mr. Vance:

Q. Mr. Thomas, are you the Joseph A. Thomas who is a defendant in this action? [155] A. I am.

Q. What is your occupation, Mr. Thomas? A. General partner of Lehman Brothers.

Q. How long have you been a general partner of Lehman Brothers? A. Since January 1, 1937.

Q. Mr. Thomas, when was the first time in 1954 that you learned that Lehman Brothers had purchased any se-

curities or was to purchase any securities of Tidewater Oil Company? A. Every day I get across my desk the purchases and sales executed by my firm for itself or customers in the form of purchase and sales sheets. They usually come around, except for week ends, of course, on the following day. I saw this purchase of Tidewater on the sales sheets.

Q. Can you tell us approximately when that was?

Mr. Levy: If your Honor please, these questions have already been asked and answered in the questions and answers read from Mr. Thomas' deposition.

The Court: If he wants to repeat them, that is all right.

By Mr. Vance:

Q. Can you tell us approximately when that was? [156] A. I believe it was around the first part of October. I can't be certain as to the exact date.

Q. What did you do, if anything, after you saw this purchase slip come across your desk? A. Well, I went in to see my senior partner, Mr. Robert Lehman, and asked what was the purpose of the purchase. He told me in support of an Arbitrage transaction. We have a regular Arbitrage Department in our firm.

Q. What did you say? A. I said I was a director of Tidewater and it could be embarrassing to me, if it was an Arbitrage transaction, because I would presume the sale of these securities in a short time, and I did not want any part of the transaction to reflect on me. So he said, "Well, you had better do something about it."

So I called Morris Gardner, our controller; I gave him instructions to exclude me from any risk of the purchase or any profit or loss from the subsequent sale and to take the necessary steps to carry out my instructions.

Joseph A. Thomas, for Defendants, Cross

Q. Did you have any discussions with your partners generally about this? A. I had no discussions. We have a partners [157] meeting every Monday at lunch, and to the best of my memory the following Monday I said, "I want you all to know that I am not a part of this Tidewater transaction at all. I am a director of the company and I have excluded myself from any profits or losses there."

The Court: Did they agree?

The Witness: Yes, sir.

Q. Did you receive any profit from this transaction? A. No, sir.

Mr. Vance: That is all, your Honor.

Cross Examination by Mr. Levy:

Q. Do you know how much profit was earned by Lehman Brothers from the purchase and sale of the 50,000 shares of Tidewater preferred stock? A. I did not know until Mr. Blau brought his action. I wasn't a part of it and I didn't have any idea.

Q. Do you know at the present time?

Mr. Vance: I can't see what relevance this has.

The Witness: I don't mind answering the question.

The Court: Let him answer the question.

[158] A. At the time of the deposition it was alleged in the neighborhood of $100,000.

Q. And how much of that profit did you supposedly waive? A. Well, at that time I believe my interest was about 4 per cent. I guess it would have been about $4,000. That is before taxes.

Q. Were you in this court room when Mr. Monblatt was testifying? A. I heard his four last answers, yes.

Q. And he testified, I believe, if I am correct, that Lehman Brothers realized a profit from the purchase and sale of preferred stock in the neighborhood of approximately $29,000. A. I thought he said 109. I couldn't hear him back there very well. I really did—I never examined the books on the transaction because I had no interest in them.

Q. Is there a separate page kept for every partner who is a director in a corporation. A. I am not aware of the mechanics of the bookkeeping. There are a set of partners' books that cover his individual securities accounts and records which, of course, would be maintained for tax purposes [159] anyway.

Q. Is it customary for a partner who is a director in a corporation to waive his interest in the short swing profits realized by a corporation?

Mr. Vance: It doesn't make any difference if it is customary.

The Court: You mean in Lehman Brothers, if it is customary?

Mr. Levy: Yes, sir.

A. I think customary is a pretty strong word. But all of us are aware of the existence of 16(b) and you certainly wouldn't want to find yourself in that predicament.

Q. Do you know of any other case where the profits were supposedly waived from such similar transaction by a member of Lehman Brothers? A. I don't recall any offhand because I don't think we have had an Arbitrage transaction in the last few years in which a partner of Lehman Brothers was a director of one of the companies involved.

Q. With respect to the moneys paid to you by Lehman Brothers, how was that arrived at? How was that computed with respect to other matters other than the stock transaction? [160] A. I am not a bookkeeper, but

they keep the books and they take in the gross and deduct the expenses and then the interest on capital, and whatever is left is divided up in accordance with the partnership agreement which is entered into at the first of every year and agreed to by all the partners.

Q. And is your contribution to the partnership taken into account when dividing up the profits? A. Do you mean in the capital I have in the firm?

Q. No, in dividing up profits of a transaction, of any transactions, is your contribution to that particular transaction taken into account? A. It would only be taken into account in a specific matter like this one where it was earmarked and waived.

Q. Now— A. I might tell you, Mr. Levy, that we have had a number of transactions in which other partners waived their interests, primarily CAB financing where by law you can't participate.

Q. Where a partner in Lehman Brothers waives his interest in a transaction, is that partner's interest distributed amongst the other partners? [161] A. It is, to my understanding, yes.

The Court: On what basis, mathematic? If you had a 4 per cent interest, for example, and you were entitled to, let's say, $4,000 on this transaction, and if you waived your interest, how would that be distributed among the other partners? On the basis of 96 per cent?

The Witness: No, sir, it is a simple mathematical transaction. You just let the 96 equal 100. If a fellow had four, he would become 4.02 or something like that.

The Court: I see.

Mr. Levy: So that from what I gather in your testimony, Mr. Thomas, it is entirely possible and it has occurred where directors have waived their interest in short swing profits in corporations in which they were

directors and the profits realized on the particular director's part were distributed amongst all the other partners.

The Witness: Yes, it occurred right here.

Mr. Levy: That is all.

Mr. Vance: No questions.

The Court: All right.

(Witness excused.)

[162] The Court: Anything more?

Mr. Vance: Yes, sir, I have a little bit more.

Mr. Levy: While we are waiting, your Honor, I wonder if I could read one question and answer—

The Court: Let's wait until Mr. Vance gets through with his case.

Mr. Vance: Mr. Levy, will you stipulate that the schedule which I am showing you is a true and correct copy of the schedule which was marked for identification during the examination before trial of Mr. Hammerslough from which you have read this morning? The schedule shows the purchase prices of the common shares of Tidewater purchased by Lehmans in 1954 and the sales prices of the preferred shares into which those common shares were converted.

Mr. Levy: I will stipulate that that is a correct copy of that, but I can't see its relevancy and must object to its relevancy with respect to the purchase prices of the common shares.

Mr. Vance: Your Honor, I offer it in evidence.

The Court: Received in evidence. You are simply saying that the purchase price is the [163] date of the conversation.

Mr. Levy: That's right.

The Court: I understand your position. We will take this for what it is worth.

Colloquy

(Marked Defendants' Exhibit E in evidence.)

Mr. Vance: Mr. Levy, I will now ask you if you will stipulate that the photostatic copies which I have laid before you are photostatic copies of SEC Form 4s which were marked Plaintiff's Exhibits 1 through 6 during the deposition of Mr. Thomas and that they are photostatic copies of the original documents filed with the SEC on the date indicated on each form.

Mr. Levy: I will so stipulate, but I will object to the writing on them which refers in any way to any waiver of Mr. Thomas' interest in the purchase of shares.

The Court: What do you want to offer them for?

Mr. Vance: I offer them in evidence, your Honor.

The Court: Cumulatively? Is this cumulative evidence?

Mr. Vance: It may be cumulative, your Honor. [164] On the other hand it may not be. I think it perhaps is cumulative.

The Court: For what they are worth I will receive them in evidence as one exhibit.

Mr. Vance: Yes, if you would, please.

(Marked Defendants' Exhibit F in evidence.)

The Court: What is the number of that form?

Mr. Vance: Form 4, your Honor.

Mr. Levy: Do I have my exception, your Honor?

The Court: Yes.

Mr. Levy: Thank you.

Mr. Vance: Mr. Levy, will you stipulate that on October 7, 1954, the board of directors of Tidewater approved a proposed plan of recapitalization which is Exhibit 1 to the proxy statement which I now hand you?

Mr. Levy: I will so stipulate.

Mr. Vance: And will you further stipulate that at a special meeting of stockholders held on No-

vember 15. 1954, an amendment to the certificate of incorporation of Tidewater Oil Company was duly adopted which created and authorized the issuance of 6,300,000 shares of the $1.20 preferred stock of Tidewater?

[165] Mr. Levy: I will so stipulate.

Mr. Vance: Will you also stipulate that at the shareholders meeting of November 15, 1954, a majority of shareholders of Tidewater authorized, approved and consented to the issuance of the $1.20 preferred stock in exchange for shares of common stock pursuant to the plan of recapitalization and approved such plan of recapitalization, which is Exhibit 1 to the proxy statement dated October 22, 1954?

Mr. Levy: I will so stipulate.

Mr. Vance: Will you also stipulate that an offer of exchange dated October 22, 1954, in accordance with the said plan of recapitalization was duly made by Tidewater to its shareholders?

Mr. Levy: I will so stipulate.

Mr. Vance: Mr. Levy, I show you the following documents, a letter dated October 22nd on the letterhead of Tidewater Associated Oil Company, proxy statement to which we have been referring, and the offer of exchange, and ask you if you will stipulate that these documents were sent to the stockholders of the Tidewater Oil Company.

Mr. Levy: I will so stipulate.

The Court: What difference does it make?

[166] Mr. Vance: I offer them in evidence.

The Court: I know, but he stipulated the essential facts. The particular language of the documents makes no difference at all so far as I can see.

Mr. Vance: If we ever reach the question of when there was a purchase and whether or not conversion

constitutes a purchase, that might become important.

The Court: All right. For that limited purpose I will take it. Mark them as one exhibit.

(Marked Defendants' Exhibit G in evidence.)

Mr. Vance: Mr. Levy tells me that his time is running short here with his conference. I may or may not be able to finish up in five minutes.

The Court: You have a conference before Judge McGohey, you say?

Mr. Levy: Yes, sir.

The Court: See if you can finish in five minutes.

Mr. Vance: I will try, your Honor.

The Court: You haven't any more to put in this case, have you?

Mr. Levy: No, sir.

[167] Mr. Vance: Your Honor, I have just looked through this and inasmuch as I see that you have still reserved with respect to Mr. Thomas' possible liability, I am going to have to read from one of the other depositions of a witness who is outside the country. I doubt if I can get it done in five minutes.

The Court: Then why don't we adjourn until tomorrow morning?

Mr. Vance: I would think it would take no more than 15 minutes tomorrow morning.

The Court: And then you will rest?

Mr. Vance: I will rest then your Honor.

The Court: Then we will finish early tomorrow morning. Any briefs you people want to submit I would like to get as soon as possible so I can hand down my final opinion.

We will adjourn until 10:30 tomorrow morning.

(Adjourned to Tuesday, April 28, 1959, at 10:30 A. M.)

Colloquy

[168] New York, April 28, 1959, 10.30 a. m.

Mr. Vance: Your Honor, before proceeding I would like to raise a point of clarification which may simplify further proceedings.

I would like to ascertain from the plaintiff whether the plaintiff now claims that the defendant Thomas should be required to account for the profits realized by the other partners of Lehman Brothers, or whether the plaintiff is only claiming that the defendant Thomas should be required to account for what would have been his regular share if he had shared in the profits of the Tidewater transaction.

Mr. Levy: Must I answer that, your Honor?

The Court: Mr. Levy, as I understand it, your complaint seeks all the profits made by the firm of [169] Lehman Brothers, and then in the alternative that if you are not entitled to get that you are entitled to at least get whatever profits Mr. Thomas got.

Mr. Levy: That's right, sir.

The Court: Now, so far as the claim against Lehman Brothers for the profits made by the firm as such, I have said that I will dismiss that claim under the *Ratner* case and the statute, but I have reserved decision so far at least on the question of any profits made by Mr. Thomas.

Now, that raises the question as to whether Mr. Thomas, by executing a waiver—I don't think he executed a waiver but by orally stating that he waived any of the profits thereby ended up with no profits in the transaction. I think that is quite a question.

Mr. Vance: Your Honor, may I ask this question: Under your ruling of yesterday, which as I under-

stand it granted a motion to dismiss as to Lehman Brothers and all of the other defendants aside from Thomas, there is still left in the case the issue of whether or not the defendant Thomas could be held liable for the profits which Lehman Brothers and the other partners realized other than [170] the defendant Thomas' ordinary share.

The Court: Well, I suppose technically that is true, but the judgment sought here is against the firm of Lehman Brothers, all of the partners, so much of the cause of action as seeks that I have dismissed. I don't believe that is justified under the statute or under the *Ratner* decision but I think the real problem we have here is this, that Mr. Thomas said that he had a 4 per cent interest in the profits of Lehman Brothers. Lehman Brothers made certain profits from this short swing transaction. He, under his partnership agreement, was entitled to a 4 per cent participation approximately in those profits. Mr. Thomas, however, said that he went to the members of the firm and said that he wanted no part in that transaction. He said the other members of the firm agreed that he should have no part in the transaction, informally, at a meeting.

Now, does that mean that he had no profits, or does that mean that he had the profits and gave them up to the members of his firm? I am thinking of it a little bit as analogous to an income tax situation. In an income tax situation if he did that he would have been considered as having the [171] profits and then making a gift of them to somebody else.

Mr. Vance: Your Honor, I understand very clearly that that issue is still in the case but I am still not clear whether or not there is still an

issue in the case as to whether or not defendant Thomas can be required to account for the profits which his partners realized.

Now, that was an issue in the *Ratner* case, and the Court there held that he definitely could not be held liable for any profit which his partners realized as a part of the transaction.

The Court: I think the statute makes it clear that it is the profits realized by the director.

Mr. Vance: I believe that is correct, your Honor.

The Court: Any profit realized by him, that is, the director.

Mr. Levy: The question arises as to whether or not a partnership can be disassociated from one of the partners. In other words, the funds of the partners can disassociate themselves from the member partner who is a director. That is one of the issues, too. And, of course, your Honor [172] has heard the evidence that Mr. Thomas testified and Mr. Montblatt testified that he supposedly waived his share of the profits and I believe the amount of the profits which he waived, allegedly waived, has been submitted in evidence by the defendants as amounting to approximately $31,000 based upon a computation of common stock.

Now, our computation, or the plaintiff's computation demands judgment in the sum of approximately $99,000 in accordance with the principles laid down by the case of *Parke & Tilford v. Schulte,* so that in any event, even if your Honor finds that the defendant could have waived and is not entitled to return any profits that he didn't receive, he still did receive the balance between $99,000 and $31,000.

The Court: The firm did.

Mr. Levy: The firm did, so that his proportionate share would be at least that.

The Court: I can understand that. I read the *Parke & Tilford* case again last night and apparently what Mr. Levy says is the measure of damages is the correct one laid down by Judge Clark in that case.

Mr. Vance: Your Honor, I respectfully [173] dissent to that but I believe we are begging the issue that I was trying to get resolved here and that is whether or not Mr. Levy is claiming at this point that Mr. Thomas should be required to account for whatever profit his partners realized.

The Court: Do you so contend?

Mr. Levy: I contend in the alternative that if the Lehman Brothers partners, as your Honor has held, are not responsible, then I say the director is responsible for all the profits or in the alternative for at least his proportionate share of the partnership profits.

The Court: All right. That is the issue then.

Mr. Vance: Your Honor, that being the plaintiff's position I must proceed to put in further evidence.

The Court: All right.

Mr. Vance: Your Honor, I intend now to read from the deposition of MR. HERMAN H. KAHN, who was a partner of Lehman Brothers and who is presently in Europe. It is dated Monday, September 23, 1957.

"Q. Will you state your name and address, please? A. My name is Herman H. Kahn, 334 Robin Road, [174] Englewood, New Jersey.

"Q. Are you a partner of Lehman Brothers? A. I am.

"Q. How long have you been a partner? A. Since January, 1950.

Deposition of Herman H. Kahn

"Q. Were you ever a director of Tidewater? A. No.

"Q. Do you know about the purchase by Lehman Brothers of Tidewater securities commencing October 8, 1954? A. Well, now, going back a period of three years, and I have a pretty firm recollection of what had happened, but I may be a little fuzzy on the percentage details, and I will relate it to you as best I can.

"At that time the company's president, Mr. David Staples, who was successor to Humphreys, had announced —I think he announced that sometime in September—that it was contemplated that the company might create a new dividend-paying security, a preferred stock—I believe he labelled it a preferred stock—to be offered to the company shareholders who wished to make an exchange, who wished to have a cash dividend income from their holdings.

"The company, prior thereto, had abandoned [175] the payment of cash dividends and was paying a stock dividend, and some stockholders were a little unhappy about this turn of events and preferred the cash dividend, and Mr. Staples, the president, announced that such a plan was under contemplation.

"Now, at that time, that announcement, in September, might very well have been construed, as it was by me personally, as the first step in a definite plan of action. The president could not have announced that this was going to be done, as a matter of fact, because he would have been anticipating his own Board of Directors. The proper procedure would be for a president to discuss it with his Board.

"So when he announced it publicly, it was perfectly clear that the next step would then be a discussion and finally a plan of action by the Board of Directors. I am sure that the president would not even dream of making it publicly available, and the news publicly available, unless his thinking were fairly well advanced.

"When it was announced we were just about coming out of the summer doldrums, or may have well been in it. Business was rather inactive at the time, and I remember there was some gossip around the office [176] about whether or not it might be a good idea to take advantage of the company's offer.

"No offer concretely had been made, you understand, Mr. Levy, but at that time it was perfectly clear that an offer was seriously contemplated and would be made. Otherwise protocol would have required that it not have gotten as far as the publicity release.

"And at that time I discussed with Marvin Levy, who headed our Sales Department, the general desirability of our taking a position in Tidewater stock. It seemed to me a fairly good open arbitrage as distinct from a closed one, one that contains a certain element of risk because all of the facts are not yet complete.

"There was the possibility, although a remote one, that the plan would not be approved by the Board of Directors and would never be submitted, but it seemed to me that this was what we called a good open arbitrage, that we could buy the common stock and that an offering of preferred would be made which would have to be palatable to the stockholders; otherwise, it would fall by its own weight and would never accomplish its ends. And in order to be acceptable, it would be a preferred stock designated with a good dividend rate as a feature. It therefore seemed [177] to be a good open arbitrage to acquire an open block of stock, either to sell in the market or arbitrage, or to have inventory available for our Sales Department.

"That is where Mr. Levy came into the picture, and Mr. Levy and I discussed it informally.

"There was some other gossip about the matter here, and on an occasion, I recollect Mr. Hammerslough querying me on the subject. Mr. Hammerslough at the time

was in charge of our Portfolio Committee, which is a very loose arrangement in Lehman Brothers, and Mr. Glazier had some discussions with me on the subject, but Bill and I, Bill Hammerslough and I, more actively than the others, and then finally with Mr. Levy. And the ball was batted from one of us to the other and then finally on one day Mr. Levy said he thought we ought to start acquiring stock and I said, 'Go ahead.'

"The question was, how much stock. It seemed like a relatively riskless operation and I suggested he go ahead and acquire up to 50,000 shares, and not to worry about it, that I would take the responsibility.

"But I want to emphasize this: The decision to buy the stock was made only after—and this I distinctly remember, even though three years have [178] elapsed—the decision was made only after it was publicly available information, that the directors approved the action, and the company was embarked upon this route.

"By that time many other houses in Wall Street were arbitraging or engaging in the position and accumulation of a position for the open arbitrage. If anything, we were late, and had we moved at the time I wanted to move, which was in September, we would have earned considerably more. As it was, I think we earned only a nominal profit on the transaction.

"Q. Do I understand, Mr. Kahn, that the first indication that you had of the stock being put on the market, or being convertible stock— A. The common was not convertible. The common would have been offered the right to convert into preferred stock.

"Q. The first time you knew about that was when you heard about that from Mr. Staples? A. No. When I read of Mr. Staples' announcement in the newspapers sometime in September. I read the Wall Street Journal, among other papers, rather religiously, from cover to cover.

Deposition of Herman H. Kahn

"Q. Did you know how many directors were on the [179] Board of Tidewater at that time? A. I did not know then nor do I know now.

"Q. Did you know that Mr. Thomas was a director of Tidewater? A. Yes, I knew that.

"Q. Did you know that a partner in Kuhn, Loeb was a member of the Board of Directors? A. Yes, I knew that Mr. Schiff was a member of the Board of Directors of Tidewater.

"Q. Did you discuss these matters with any of these gentlemen? A. I would have regarded it as altogether improper to discuss any confidential matter with either of these gentlemen.

"Mr. Gallantz: And therefore you did not?

"The Witness: And I did not.

"A. (Continuing) I might add, in answer to that, that I felt I was entirely capable of arriving at a judgment on my own. Here at Lehman Brothers we have a rather, I would say, loose but highly effective organization. We are not compartmentalized here. I—we all have varying skills. My skills, as regarded by my partners, whether right or wrong, are in the area of pricing securities. I kept in very close touch with [180] the market for senior securities, bonds, private placements, public and otherwise, and with preferred stocks. And at that time I felt that the preferred stock market was—there was a healthy institutional demand for preferred stocks, and this was ideally suited for an open arbitrage.

"I would not have elicited any opinion from my partner, Mr. Thomas, to begin with, because it would have been improper to do so. Aside from that, I felt entirely capable —without disparagement to my partner—I felt I could have arrived at a judgment of a preferred stock deal more accurately than he."

Mr. Vance: Your Honor, that is all I have to read from Mr. Kahn's deposition.

The Court: Do you want to read anything from Mr. Kahn's deposition, Mr. Levy?

Mr. Levy: I would like to read page 12 of Mr. Kahn's deposition, question 3:

"Q. Do you know that the present directors of Monterey Oil include two members of the Lehman Brothers firm, Mr. Fell— A. Yes, I know that, Mr. Fell and Mr. Ehrman. I am usually well posted on who in Lehman Brothers is on what company's board."

[181] Now, if your Honor please, before going any further I would like to draw your attention to the testimony of Mr. Kahn on page 7 in which he said—

The Court: Has it been read?

Mr. Levy: Yes—in which he stated—

Mr. Vance: What is the significance then?

Mr. Levy: I want to show that Mr. Gutman—rather, Mr. Hammerslough and Mr. Kahn are in direct conflict as to who gave—

The Court: That is a matter of argument. Let's move on with the testimony.

Mr. Vance: Have you anything further to read from Mr. Kahn's deposition?

Mr. Levy: No, sir.

Deposition of Joseph A. Thomas

Mr. Vance: Your Honor, I just have one more excerpt to read from Mr. Thomas' deposition. It is only one question and answer and therefore I don't think it is necessary to have Mr. Carlson read it. This is from page 8 of MR. THOMAS' deposition which was read yesterday. Question 2:

"Q. You mentioned that there was a committee in charge of making purchases and sales of securities on Lehman Brothers account. A. That is right. There is such a committee.

[182] "Q. Prior to the purchase by Lehman Brothers of Tidewater stock did any member of that committee speak to you concerning it? A. No."

The Court: Any more testimony?

Mr. Vance: The defendant rests.

The Court: Both sides rest?

Mr. Levy: If your Honor please, I don't rest at the moment, your Honor. I would just like to ask the defendant to stipulate that as of March 8, 1955, the profits of the firm of Lehman Brothers at that time did not exceed 47.05 per cent of the total profits made by Lehman Brothers for the year 1955.

Mr. Vance: Your Honor, I just don't know what the fact is.

The Court: 47.05 didn't exceed—

Mr. Levy: Of the total profits for the year.

The Court: Profits of what?

Mr. Levy: The total profits made by Lehman Brothers, which was subject to distribution to the partners.

The Court: Didn't exceed what?

Mr. Levy: 47.05 per cent of the total profits made by Lehman Brothers during the year 1955.

[183] The Court: Now wait a minute. That is inconsistent. You say the profits didn't exceed the profits.

Mr. Levy: No, I say the total profits, the profits realized by Lehman Brothers up to March 8, 1955, which were subject to distribution to all the partners, all the general partners, did not exceed 47.05 per cent of the total profits made by Lehman Brothers for the entire year.

The Court: Well, of course, I don't know how Lehman Brothers distributes their profits. Maybe they distribute them on an annual basis, so I don't know that the profits of the three months makes any difference there.

Mr. Levy: The only reason I suggest—

The Court: There is no proof as to how they distribute their profits.

Mr. Levy: The only reason I suggest that, your Honor, is that it has been testified that Mr. Thomas receives 4 per cent of the first 47.05 per cent of the profits.

The Court: All right.

Mr. Levy: Now, the first 47.05 I assume is what has been made up to a certain period, up to [184] a certain time.

The Court: Up to the time the 47 per cent of the profits, I suppose they do it on some regular accounting basis, either annually or monthly or something like that. I don't know. There has been no testimony on that. But I am ready to assume, Mr. Vance, that the profits, whatever they were, on this Tidewater stock, did not exceed 47-1/2 per cent of the profits of Lehman Brothers. In other words, that Mr. Thomas' 4 per cent rather than this one point-something-or-other per cent would be applicable to those profits.

Mr. Vance: Your Honor, I don't know what the profits of Lehman Brothers were as a total by March of 1955.

The Court: I don't either.

Mr. Vance: On the other hand, as I understand it, for every dollar that comes in there is a distribution on the basis which was outlined yesterday.

The Court: How do they know what the profits are until they have some accounting period?

Colloquy

Mr. Vance: I don't know what their accounting period is.

The Court: There has been no proof of that.

Mr. Vance: That's correct.

[185] The Court: Therefore I assume that is profits he was entitled to. It would be up to him to show the accounting period to make the difference. Back in 1929, for example, Lehman Brothers made a lot of profits in the first three months of the year, but if they had an annual accounting basis of profits probably by the end of the year they ended up with a deficit like most investment firms did, but in the absence of any proof I will take it that he was entitled to 4 per cent of the profits.

Mr. Vance: Your Honor, I can't see what difference it makes whether or not Lehman Brothers, by March 8, had earned 47 per cent of the total profits that they earned during the year 1955.

The Court: I don't either.

Mr. Vance: Therefore, I can't stipulate it.

The Court: I am just telling you that I am going to assume that the 4 per cent bracket of Mr. Thomas' agreement is applicable to this in the absence of other proof.

Mr. Vance: Yes.

Mr. Levy: The plaintiff rests, your Honor.

Mr. Vance: I think the schedules which were offered and not received in evidence yesterday, your [186] Honor, show the way that the computations were made on this particular transaction which is in issue.

The Court: Those schedules showed that they allocated the profit to the other partners of the firm.

Mr. Vance: That's correct, your Honor.

The Court: And they also showed that the cost price was the cost of the common stocks which were originally bought. I don't believe that those schedules made by this assistant comptroller are necessarily conclusive.

Mr. Vance: They are made in the ordinary course of business. That is his regular duty to do it and he so testified.

The Court: Well, you are now talking about Exhibit C for identification I take it.

Mr. Vance: I believe it was C and D.

The Court: C and D. Do you want them put in evidence? Do you really feel that they should go in evidence?

Mr. Vance: I think so.

The Court: I will reverse my ruling and put them in evidence.

Mr. Levy: Of course I object to that.

[187] The Court: They are documents compiled in the regular course of business. I don't think they mean very much. But if you want them as part of the record to talk about them, all right.

(Defendants' Exhibits C and D received in evidence.)

The Court: Both sides rest, then.

Mr. Vance: Yes, sir.

Mr. Levy: Yes, your Honor.

Mr. Vance: Your Honor, at this point I would like to renew my motion to dismiss with respect to the defendant Thomas, and to move for judgment dismissing the claim that Thomas be required to account for what he normally, what normally would have been his share of the profits realized in the Tidewater transaction.

Not only has the plaintiff failed to show that he realized any profit, but the evidence shows conclusively that he did not. What is that evidence? Mr. Thomas testified yesterday that immediately upon hearing about the purchase of Tidewater stock he went to the senior partner of the firm, Mr. Lehman, and told him that he wanted to disassociate himself in every way possible from the transaction, either in [188] putting his money at risk, in running the risk of loss, or in sharing any profits.

Colloquy

The Court: Let me ask you this, Mr. Vance: Suppose that thereafter they had made a commitment to buy this Tidewater stock, and that Lehman Brothers went into bankruptcy, do you mean to say that Mr. Thomas's capital would not have been at risk in that transaction because he had made that statement to a partner of his?

Mr. Vance: Your Honor, I have not researched that. It might be possible that it might not, but—

The Court: Well, his capital was part of the assets of the firm and held out as such to the public. I don't believe that if a creditor sued Lehman Brothers after that, that Mr. Thomas could say, "Oh, no, my capital, I had a side understanding with my senior partner that that wouldn't be at risk"?

Mr. Vance: But the crucial thing is whether or not he realized any profit.

The Court: I think the same thing is true on the profit.

Mr. Vance: Well, now, if you can remember what he did, your Honor. He testified that he then went to the treasurer of Lehman Brothers and [189] said, "Take appropriate action so that I will not get any part of the profit which may be realized on this transaction." Such steps were taken in the treasurer's office and no part of the profit was allocated to him. The Form 4s which were filed waived any right.

The Court: What does that mean other than that he was entitled to a profit and he said, "I will give it to my partners"?

Mr. Vance: Well, your Honor, just one more thing. He also testified that he went to the partners meeting and he told them that he waived any right to share in the profits of the transaction and that they agreed. Now, perhaps that was an amendment *pro tanto* of the partnership agreement with respect to this transaction.

The Court: It was an oral statement made by him. It isn't a formal amendment to the partnership agreement.

Mr. Vance: In any event, your Honor, he didn't realize any profit from the transaction.

The Court: He didn't take any profit, but did he realize it without taking it? That is the question.

Mr. Vance: Your Honor, we respectfully submit [190] that he did not realize any even without taking it.

Secondly, your Honor, I move for judgment dismissing the claim that Thomas be required to account for any profit which his partners may have realized in this transaction.

Now, on that I think the law is clear under the Ratner case, your Honor, that very issue was up. Whether or not Mr. Hertz in that case should be required to account for the profit which his partners had realized in the sale, purchase and sale of Consolidated Vultee stock. The Court of Appeals for the Second Circuit held that he could not be liable. Now, it is true that they went on in dictum there and said, "Whether the result might have been different had he caused the firm to make the purchases we need not now determine."

However, even applying that test, there is not a shred of evidence in this record which indicated that he caused or had any connection with the purchase—

The Court: I am inclined to agree with you that that proof does not indicate that he caused the purchase by Lehman Brothers of this stock. Whether it would be different if he had caused it is something which Judge Hand seemed to be somewhat in doubt about [191] and I would be in doubt about, but I don't believe that he did cause it to be made on the evidence here.

Now, I take it that the *Ratner* case means that the partnership as such, which is the other partners, are not responsible for the profits under those circumstances. That is my present inclination in the case. The one doubt I have in my mind is whether the director himself, if he realized a profit, and that is a question of fact, re-

alized it through the partnership, may be required to account for that profit realized by him through his partnership. I can visualize a situation where a man, let us say, has one other partner. He is a director of a company, and he goes on the board, and the partnership buys securities and sells securities in a company of which he is a director, and in that situation it seems to me that the statute would say that he had realized profits on that. I don't think it makes any difference that it is a big partnership rather than a small partnership.

Now, that is my present thinking.

Now, whether he realized profits here is, of course, a question of what you mean by "realized." Can a person disassociate himself from the profits [192] and simply say, "Well, I don't want those profits any more," and say, "Well, I didn't realize them." From an income tax standpoint I don't think you can do that. I may be wrong. I am not an income tax lawyer. Somebody gets some income and then simply says, "I don't want them, give them to somebody else," the income tax people say "It was yours, you made a profit, you made a gift of them, and you must pay a gift tax too." Maybe that is the situation here.

But I think it is an interesting question of law, and it is sufficiently important that I presume that I should write an opinion on it, not necessarily for this case but because it may be important in other cases where this question comes up.

I am, therefore, going to reserve decision on it and give each of you an opportunity to file briefs, and write an opinion on the subject.

Mr. Vance: Your Honor, may I ask one question? Are you also reserving decision on whether or not Thomas can be held accountable for the profits that his partners realized, or are you ruling on that motion?

The Court: I am reserving decision on it, but my thinking is that it is the same thing as to [193] whether Lehman Brothers is liable.

Mr. Vance: I think it is exactly the same, your Honor.

The Court: And that is why technically I am reserving decision on it.

Mr. Vance: Right.

Mr. Levy: I was going to say, your Honor, that the facts in the Ratner case were different than they are here in that no testimony had been taken of any of the partners of Lehman Brothers, no testimony or evidence had been shown that any of the partners had spoken to the director concerning the affairs of the corporation upon which that particular director-partner was a member, while in this case we have direct testimony that at least five or six of the general partners of Lehman Brothers, including the person who actually gave the order to buy the securities, Mr. Hammerslough, had spoken to Mr. Thomas concerning the affairs of Tidewater.

The Court: But not about the proposed change in the capital structure.

Mr. Levy: No, sir, but about the general affairs of Tidewater. In order to purchase stock, your Honor— [194] The Court: This statute is for the purpose of preventing the unfair use of information. Now, there is no indication here that there was any unfair use of information in connection with this transaction. The testimony was complete that the announcement of the proposed issuance of a dividend-paying stock and the proposed conversion of common into that stock came out in the Wall Street Journal in September. That the first discussions of the partners of Lehman Brothers took place after that came out; that they didn't decide to buy it until a later announcement came out in the Wall Street Journal on October 8th, I think it was, saying that the board of directors had approved the plan subject to a subsequent meeting of the stockholders.

Now, there is nothing there that you and I, Mr. Levy, wouldn't have known about.

Mr. Levy: Well, your Honor, of course I suppose I ought to reserve it for my brief, but in the case of Newman v. Ashland Oil Company, decided in the Sixth Circuit in Ohio, and in an opinion written by Judge Potter Stewart, who is present in the Supreme Court, he stated that where there is any possibility—

[195] The Court: Is he there or is he still on the anxious seat?

Mr. Levy: I think he has been confirmed.

The Court: I saw the Senate Committee approved him, but I didn't know that they voted on it.

Mr. Levy: He has made the statement that where there is any possibility of use of inside information, the insider must be held. As a matter of fact, the statute itself, Section 16(b) particularly states that although the insider may have no intention whatsoever of using inside information, as a matter of fact the courts in this district and in other districts have construed that section that even though he may never have made use of such inside information—

The Court: This is a definite statute and whether he uses inside information or not, if certain events take place within a certain period of time, the director is liable.

Mr. Levy: That's right.

The Court: That is why I think the statute has to be definitely construed as confined to the director and not to the partnership because it might be contended that the partnership benefited by inside information and should account. That is what I talked [196] about yesterday as possibly a common law, but you are not relying upon that; you are relying upon the statute.

Now, I don't think that Judge Stewart or Mr. Justice Stewart, if he has now been confirmed, is doing anything more than stating what the statute states.

Mr. Vance: I think that is correct, your Honor. If your Honor will read the case, that is exactly correct.

Mr. Levy: I would like to submit a brief on these points, your Honor.

The Court: When can you get your briefs in?

Mr. Vance: Your Honor, one point I will also perhaps want to brief further is the point that we briefed very slightly in our pretrial memorandum and that is the question of whether or not there in fact was a purchase at the time of conversion. It is our position that there was not a purchase at that time.

The Court: Cover that also. That, I think, you have the problem of running up against Judge Clark's opinion in the Shulte case or something like that.

Mr. Vance: Yes, but I think that that [197] has subsequently been clarified in Roberts v. Eaton in this circuit.

Your Honor, I would think that we could get it in within a week, if that is all right.

The Court: All right. That is all right with me.

Mr. Levy: That is all right with me, too.

The Court: Say a week from today. Today is Tuesday. Do you want to file it next Tuesday then?

Mr. Vance: Yes, sir, that would be fine.

The Court: That gives you the week end to work on it.

Mr. Vance: Thank you, your Honor.

The Court: All right, decision is reserved.

[269]

Opinion.

DAWSON, D. J.:

This is an action based upon §16(b) of the Securities Exchange Act of 1934, 15 U. S. C. A. §78p(b),* in which plaintiff, a shareholder of defendant Tide Water [270] Associated Oil Company (hereinafter called "Tide Water"), seeks an accounting by defendants other than Tide Water of certain profits realized from alleged purchases and sales of securities within a period of less than six months.

This action was tried by the Court without a jury and the following are the findings of fact of the Court.

At all material times the securities of defendant Tide Water were registered on the New York Stock Exchange. Defendant Joseph A. Thomas was, at the time of the transactions here involved, a director of Tide Water and also a member of a partnership doing business as Lehman Brothers. In 1954 under the partnership agreement Thomas was entitled to receive 4% of the first 47.05% of the profits and 1.85% of the remaining 52.95%

* Section 16(b) reads as follows:

"For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection."

of the profits. In 1955 he was entitled to receive 4% of the first 44.05% of the profits, plus 1.85% of the remaining 55.95%.

In 1954, at the age of 76, defendant John Hertz, then a partner of Lehman Brothers, resigned his directorship of Tide Water. After resigning he spoke with Mr. Staples, President of Tide Water, and recommended defendant Thomas as a prospective director of Tide Water. Hertz then asked Thomas whether he would like to become a director of Tide Water and Thomas said that he would. Mr. Thomas was then introduced to Mr. Staples at the home of John Schiff, a friend of Mr. Thomas and a partener of Kuhn, Loeb & Company. [271] Staples and Thomas then met several times, culminating in Staples asking Thomas if he would like to be a director. The invitation to join the Tide Water Board was upon the initiative of Tide Water. Thomas accepted the directorship because of his interest in the oil business and because of the prestige factor in serving on the Board of a large corporation.

Between October 8, 1954 and November 15, 1954, the partnership, Lehman Brothers, purchased in the regular course of its business 50,000 shares of Tide Water common stock at an aggregate cost of $1,330,800. The purchase of these shares by Lehman Brothers was made at the direction of the partners constituting the investment committee of the firm, of which Thomas was not a member, and he was not consulted by his partners as to the proposed plan of recapitalization of Tide Water, or with reference to any of the affairs of Tide Water, except to say to them that he believed it was a good company under good management. The Court finds as a fact that the stock of Tide Water was bought and sold by Lehman Brothers without any advice or concurrence of Thomas, or without his knowledge until after the transactions had taken place.

Opinion

Pursuant to a plan of recapitalization, Lehman Brothers exchanged its 50,000 shares of common stock on December 8, 1954 for 50,000 shares of a new preferred stock [272] issued by Tide Water. Between December 9, 1954 and March 8, 1955, Lehman Brothers sold its 50,000 shares of preferred stock realizing in the aggregate the sum of $1,361,186.77. Lehman Brothers' purchases of Tide Water common stock were made upon the basis of two articles published in the Wall Street Journal. The first of these articles appeared on September 17, 1954. In it Tide Water announced that it was considering a proposal to allow shareholders to exchange common stock for a new dividend-paying preferred stock. On October 8, 1954 a second article appeared in the Wall Street Journal which announced that the Tide Water board of directors had approved plan of recapitalization under which it proposed to create an issue of $1.20 dividend cumulative preferred stock and under which plan all holders of its common stock could exchange their common stock on a share-for-share basis for the new dividend-paying cumulative preferred stock.

Beginning on October 8, 1954, after the plan of recapitalization had been approved by the Tide Water board and had become public information, Lehman Brothers, planning to convert Tide Water common into Tide Water preferred, and acting solely on the basis of Tide Water's public announcements and without consulting Thomas with reference thereto, purchased the 50,000 shares of Tide Water common stock which were exchanged for an equal number of shares of the newly [273] issued preferred stock on December 8, 1954. By March 9, 1955 Lehman Brothers had sold all the preferred stock.

Joseph A. Thomas, who had served as a director of Tide Water since August 5, 1954, from the outset completely revealed the firm's transactions just described by filing monthly statements with the Securities and Ex-

change Commission for October, November and December, 1954 and January, February and March, 1955.

When Thomas learned that his firm had purchased shares of stock in Tide Water, of which he was then a director, he orally indicated to his partners that he wished to be disassociated with the transaction and that he waived his interest in it. According to his testimony he made this statement at a meeting of partners and his partners acquiesced. Later, when the transaction was completed by the sale of the Tide Water stock, a statement was prepared by the Comptroller of the firm showing the profits made by Lehman Brothers on the transaction, but no share of the profits was shown as attributable to Thomas and what otherwise would have been his share of the profits was allocated to the other members of the firm.

Plaintiff, a stockholder of Tide Water, through his attorney, sent a letter on June 29, 1955, pursuant to §16(b), requesting Tide Water to institute suit against defendants Lehman Brothers and Thomas to recover profits [274] realized in the above transaction. Further, plaintiff allowed more than sixty (60) days to elapse after making the demand, and when Tide Water failed to bring the suit plaintiff brought this action.

The law is now well settled that the mere fact that a partner in Lehman Brothers was a director of Tide Water, at the time that Lehman Brothers had this short swing transaction in the stock of Tide Water, is not sufficient to make the partnership liable for the profits thereon, and that Thomas could not be held liable for the profits realized by the other partners from the firm's short swing transactions. *Rattner v. Lehman Brothers*, 193 F. 2d 564, 565 (2d Cir. 1952). This precise question was passed upon in the *Rattner* decision. Judge L. Hand, in a concurring opinion in the case, said that he wished to say nothing as to "whether, if a firm deputed a partner to represent its interest as a director on the

board, the other partners would not be liable." In this case there was no evidence that the firm of Lehman Brothers deputed Thomas to represent its interests as director on the board of Tide Water; in fact, the interests of Lehman Brothers in Tide Water at the time Thomas was elected to be director were minimal.

In the *Rattner* case the partner of Lehman Brothers who was a director of the corporation whose shares had been involved, realized $806.62 profit from the transaction and he paid the money over to the corporation. Thomas has [275] paid nothing over to Tide Water. The Court dismissed the instant action as to Lehman Brothers on the authority of the *Rattner* decision, leaving open, however, the question as to whether Thomas individually might be liable for his share of the profits on the short swing transaction.

The basic question which this Court must decide on this issue is whether an insider-partner *realizes* profits within the meaning of §16(b), and is liable therefore, if he orally waives receipt of his share of the profits made by the partnership in "short swing" transactions of his corporation's securities.

Section 16(b) of the Securities Exchange Act of 1934 provides that all profits "realized" by an officer or director of a corporation from short term trading in its securities shall inure to the corporation. The purpose of the statute is to prevent, in short term trading in its securities, the possible unfair use of information which may have been obtained by an officer or director of the corporation by reason of his position. One of the purposes of §16(b) was to prevent questionable transactions between insiders among themselves to the possible detriment of the minority shareholders and the public in general.

In *Kogan v. Schulte*, 61 F. Supp. 604, 609 (S. D., N. Y., 1945), aff'd *sub. nom. Park & Tilford, Inc., v. Schulte*, 160 F. 2d 984 (2d Cir. 1947), the Court stated:

[276] "We must not lose sight of the purposes of the statute. Judge Clark in *Smolowe v. Delendo Corporation, supra,* gives us a standard of interpretation which is applicable to the facts of the present case. He states (136 F. 2d at page 239): 'The statute is broadly remedial. Cf. *Wright v. Securities and Exchange Commission,* 2 Cir. 112 F. 2d 89. Recovery runs not to the stockholder, but to the corporation. We must suppose that the statute was intended to be thorough-going, to squeeze all possible profits out of stock transactions, and thus to establish a standard so high as to prevent any conflict between the selfish interest of a fiduciary officer, director, or stockholder and the faithful performance of his duty. Cf. *Woods v. City Nat. Bank & Trust Co. of Chicago,* 312 U. S. 262, 61 S. Ct. 493, 85 L. Ed. 820; *In re Mountain States Power Co.,* 3 Cir. 118 F. 2d 405; *Otis & Co. v. Insurance Bldg. Corp.,* 1 Cir. 110 F. 2d 333; *In re Republic Gas Corp.,* D. C. S. D., N. Y., 35 F. Supp. 300.'"

In the instant case we have a situation where liability of Thomas would be clear if Thomas had taken his share of the profits. Did he, by oral waiver and transfer of his profits to other partners, insulate himself against liability under §16(b)? The primary question is whether or not the defendant Thomas "realized" a profit within the meaning of the statute and is therefore liable. The legislative history is not very helpful on this problem. There is no guide to the meaning of the phrase "profit realized by him." Ordinarily there is no difficulty in ascertaining who realized the profit; it is the person for whose account the purchases and sales are made. Thus in the case of trading done for the account [277] of a partnership, one of whose members is an insider of the corporation whose stock was traded, the profit is realized and re-

covery allowed to the extent of the insider's proportionate partnership interest, rather than the full profit of the partnership. Cook and Feldman, *Insider Trading Under the Securities Exchange Act*, 66 Harv. L. Rev. 612, 628 (1953).

For the reasons set forth below, this Court feels that Thomas must still be held liable for what would have been his proportionate share of the partnership profits.

An insider-partner has at all times a beneficial interest in the purchase of all securities of the partnership and must report such ownership under §16(a); and also must account for any profits from a sale thereof within six months. Rubin and Feldman, *Statutory Inhibitions Upon Unfair Use of Corporate Information by Insiders*, 95 U. PA. L. Rev. 468, 488 (1947).

Thomas admittedly was a partner of Lehman Brothers when the Tide Water stock was acquired and when it was sold. His capital was certainly at risk in the transaction; he could not, by any declaration of waiver, alter this situation. When the transaction ended with a profit to Lehman Brothers, that profit, so far as Thomas was concerned, did not belong to him. Under §16(b) it belonged to Tide Water. He could not, by a personal waiver of his profits, deprive Tide Water of what belonged to it. If his waiver was effective to transfer [278] his share of the profits to his partners, then it is clear that by making such transfer of profits he was disposing of profits and to that extent he "realized" the profits.*

* For taxation purposes income has been held to be "realized" when it is made subject to the will and control of the taxpayer, and could be, except for his own action or inaction, reduced to actual possession. *Loose v. United States*, 74 F. 2d 147, 150 (8th Cir. 1934). See also, *Helvering v. Horst*, 311 U. S. 112 (1940), wherein realization of income was defined as the power to procure payment to another.

Money, property or profits "realized" usually means brought into possession and is usually used in contrast to hope or anticipation, but it need not be cash in hand to be "realized." *U. S. Smelting, Refining & Mining Co. v. Haynes*, 176 P. 2d 622 (Utah 1947). See also, *Lorillard v. Silver*, 36 N. Y. 578, 579 (1867).

To permit a partner to waive the cash receipt of his partnership share and thereby escape liability is to create a situation which would frustrate the remedial purpose of §16(b). It would permit avoidance of the statute by insider-partners of the same partnership but of different directorships by allowing them to interchange inside information and then waive the receipt of their share. This would result in each partner at varying times benefiting from this mutual waiver. An authority has ably stated what should be the rule:

> "A partner should not be able to avoid the status of a beneficial owner by merely renouncing his interest in any profit from the transaction." Loss, Securities Regulation, 585 (1951).

The Court concludes that Thomas is accountable to Tide Water for his proportionate share of the profits of Lehman Brothers in the short swing transaction in Tide Water stock. The Court concludes that the profits of Lehman Brothers on this transaction were $98,686.77.* Since Thomas' share of the profits, under the partnership agreement, varied with the particular years in which the profit was realized and apparently did not depend on the profits from an individual transaction, but rather with respect to the entire profits of the partnership, the evidence is not sufficient to determine with accuracy the amount "realized" by Thomas. If the parties cannot agree upon

* The cost of the shares to Lehman Brothers must be determined as the lowest price at which Tide Water common stock was selling at the time the common stock was converted into preferred stock, for this conversion constituted the purchase. *Park & Tilford, Inc., v. Schulte*, 160 F. 2d 984 (2d Cir. 1947); *Smolowe v. Delendo Corp.*, 136 F. 2d 231 (2d Cir. 1943), cert. denied 320 U. S. 751 (1943); *Gratz v. Claughton*, 187 F. 2d 46 (2d Cir. 1951), cert. denied 341 U. S. 920 (1951). The lowest price at which the stock was selling on the conversion date was $25.25 per share, which would mean that the aggregate purchase price for the 50,000 shares was $1,262,500. Within six months the converted shares were sold for an aggregate price of $1,361,186.77. The profit was therefore $98,686.77.

this figure, it will be necessary to refer this item of damages to a special master to take and state the account.

Submit decree in accordance with this opinion.

Dated: New York, N. Y. May 22, 1959

ARCHIE DAWSON
U. S. D. J.

[284]

Judgment.

The issues in the above-entitled action having been brought on regularly for trial before the Hon. Archie O. Dawson without a jury on April 27 and April 28, 1959 and the Court having considered the evidence and the arguments and having filed its opinion, findings of fact and conclusions of law; it is hereby

Ordered, Adjudged And Decreed, that defendant, Tidewater Oil Company, have judgment against defendant Joseph A. Thomas for the sum of $3,893.41, together with costs as taxed in the sum of $297.40; and it is further

Ordered, Adjudged And Decreed that the action be, and the same hereby is, dismissed on the merits as to defendants Robert Lehman, Allan S. Lehman, John Hertz, John M. Hancock, Monroe C. Gutman, Paul M. Mazur, William J. Hammerslough, Francis A. Callery, Frederick L. Ehrman, John R. Fell, William S. Glazier, Phillip H. Isles, Herman H. Kahn, Edwin L. Kennedy, Frank J. Manheim, Paul E. Manheim, Morris Natelson, Harold J. Szold and Joseph A. Thomas, a co-partnership doing business under the firm name and style of Lehman Brothers; and it is further

[285] Ordered, Adjudged And Decreed, that the defendant, Tidewater Oil Company, pay to Morris J. Levy, Esq., attorney for the plaintiff herein, such reasonable counsel fee for his legal services rendered herein plus his disbursements incurred as the Court may allow upon his application therefor; and it is further

Judgment

Ordered, Adjudged And Decreed, that the jurisdiction of the parties and the action herein is retained by this Court for the purpose of the application by plaintiff's attorney for an allowance of his counsel fees and disbursements.

Dated: New York, N. Y., June 25, 1959.

ARCHIE DAWSON
U. S. D. J.

Judgment entered 6/25/59
Herbert A. Charlson
Clerk

[286]

Notice of Appeal.

Sirs:

Please Take Notice that Isadore Blau, plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit, from only those parts of the Judgment entered in this action on the 25th day of June, 1959, which (1) dismissed the action on the merits as against defendants, Robert Lehman, Allan S. Lehman, John Hertz, John M. Hancock, Monroe C. Gutman, Paul M. Mazur, William J. Hammerslough, Francis A. Callery, Frederick L. Ehrman, John R. Fell, William S. Glazier, Philip H. Isles, Herman H. Kahn, Edwin L. Kennedy, Frank J. Manheim, Paul E. Manheim, Morris Natelson, Harold J. Szold and Joseph A. Thomas, a co-partnership doing business under the firm name and style of Lehman Brothers; and (2) granted judgment against defendant, Joseph A. Thomas in the sum of only $3,893.41, and said plaintiff hereby appeals from those parts of said Judgment only.

Dated: New York, N. Y., July 15, 1959.

Yours, etc.,

MORRIS J. LEVY
Attorney for plaintiff

To:

Simpson, Thacher & Bartlett, Esqs.
Attorneys for defendants,
other than Tide Water Oil Company

Hecht, Hadfield, Farbach & McAlpin, Esqs.
Attorneys for defendant, Tide Water Oil Company

[287]

Notice of Cross-Appeal.

Sirs:

Please Take Notice that Joseph A. Thomas, one of the defendants above-named, hereby cross-appeals to the United States Court of Appeals for the Second Circuit from that part of the final judgment entered in this action on June 25, 1959, in favor of defendant Tide Water Oil Company and against defendant Joseph A. Thomas.

Dated: New York, New York, July 20, 1959.

Yours, etc.,

SIMPSON, THACHER & BARTLETT,
Attorneys for Defendants other
than Tide Water Oil Company,

To:

Morris J. Levy, Esq.,
Attorney for Plaintiff,

Messrs. Hecht, Hadfield, Farbach & McAlpin,
Attorneys for Defendant Tide Water Oil Company,

Defendants' Exhibit A.

Wall Street Journal Sept. 17, 1954

Tide Water Oil May Issue Preferred for Part of Outstanding Common

By a Wall Street Journal Staff Reporter

Los Angeles—Tide Water Associated Oil Co. is considering a proposal to let shareholders exchange part of their stock for a "regular cash-dividend-paying stock."

David T. Staples, president, said the board of directors at a meeting September 2 discussed informally the possibility of making available preferred stock in exchange for "a portion" of the outstanding common.

He explained that "since the board decided to use for modernization and expansion all cash income reasonably available, Tide Water management has explored means by which stockholders who require cash income might be given an opportunity to exchange their stock for a regular cash-dividend-paying stock."

Tide Water has not had any preferred stock outstanding since 1950. It has not paid a cash dividend on the common since last March, when a 25-cent quarterly payment was made. A 5% stock dividend was disbursed in June, with the explanation the company needed its cash for corporate purposes. Mr. Staples told the Petroleum Press Club here, when he stated the plan for a new preferred was being considered, that there is a "tremendous demand" for cash to finance expansion of refinery facilities on both the Pacific and Atlantic coasts as well as a "very substantial" expansion of marketing facilities and an active exploration program.

Defendants' Exhibit B.

Wall Street Journal Oct. 8th 1954

Tide Water Associated Oil Plans to Issue $1.20 Preferred Stock

Under Recapitalization Plan Holders Could Exchange Common For New Issue

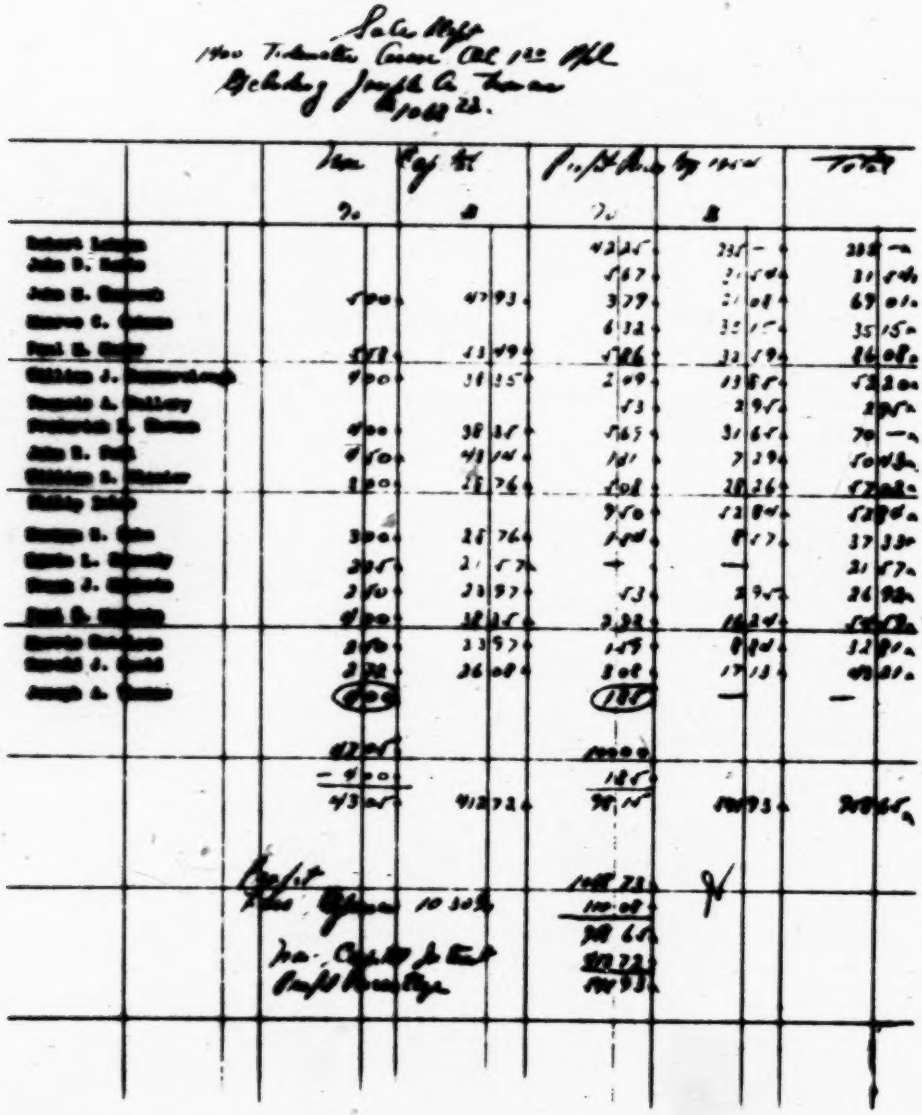
San Francisco — Tide Water Associated Oil Co. directors approved a plan of recapitalization under which it proposes creating an issue of $1.20 dividend cumulative preferred stock of $25 par value.

Holders of outstanding common stock, other than Mission Development Co., Mission Corp. and Pacific Western Corp., would have an opportunity to surrender all or any part of their common shares in exchange for the new preferred on a share-for-share basis. The three corporations named own together about 53% of the common stock.

A stockholders' meeting has been called for November 15 to vote on the plan and on necessary changes in the certificate of incorporation. It is expected the exchange offer will be submitted to stockholders about October 22 along with notice of the meeting. Its adoption will be conditioned on obtaining necessary approval at the November 15 meeting.

D. T. Staples, president of Tide Water, explained the company's extensive program of capital expenditures has made it advisable to pay cash dividends during the second and third quarters and made it unlikely that any significant cash dividends will be paid for some time. A 5% stock dividend was paid in June.

While most stockholders appear content to forego cash dividends in the interest of capital growth, some have evidenced a desire to receive cash dividends no smaller than those paid before, Mr. Staples said.



Sales Dept

P

Tidewater Assoc. Oil Co. 730 Pfd
Excluding Joseph C. Thomas

	1955 Non-Capital 11122.54 %	$	Non-Capital Interest 29318.04 %	$	John M. Hancock 18195.50 %	$	1955 Profit Percentage %	$	Total	Less Expenses 11.50%	Net Amount
[redacted]							41.31	7072.79	7072.79	813.36	6259.43
[redacted]							5.67	970.78	970.78	111.64	859.14
[redacted]			2.00	586.36	3.00	545.87	3.79	648.90	1781.13	204.83	1576.30
[redacted]							6.32	1082.06	1082.06	124.44	957.62
[redacted]			5.58	1635.94			5.86	1003.31	2639.36	303.51	2335.85
[redacted]			4.00	1172.72			2.49	426.32	1599.04	183.89	1415.15
[redacted]							.53	90.74	90.74	10.44	80.30
[redacted]			4.00	1172.72			6.63	1135.14	2307.86	265.40	2042.46
[redacted]			4.50	1319.31			1.31	224.29	1543.60	177.51	1366.09
[redacted]			3.00	879.54			5.05	864.76	1744.30	200.17	1544.13
[redacted]							9.50	1626.52	1626.52	187.05	1439.47
[redacted]	.25	27.81	3.00	879.54			1.54	263.67	1171.02	134.67	1036.35
[redacted]	.50	55.61	2.25	659.66			—	—	715.27	82.26	633.01
[redacted]	.50	55.61	2.50	732.95			.53	90.74	879.30	101.12	778.18
[redacted]			4.00	1172.72			2.92	499.94	1672.66	192.36	1480.30
[redacted]	.50	55.61	2.50	732.95			1.59	272.23	1060.79	121.99	938.80
[redacted]	.28	31.14	2.72	797.44			3.08	527.33	1355.92	155.93	1199.99
[redacted]			(4.00)				(1.55)	—	—	—	—
	2.53	225.78	44.05	11741.87	3.00	545.87	100.00	16804.52	29318.04	3371.52	25[illegible]42
			− 4.00				1.55				
			40.05				98.45				

Inv. Mkt Value @ 12/31/54	1312200 -
Cost	1294004.50
Appreciation (J.M. Hancock Basis)	18195.50
Firm Profit (Firm Basis)	29318.04
1955 Non-Cap Gains (2.03%)	11122.54

Trade Date	Shares Purchased	Price	Cost
10/8/54	2600	26-1/4	68,334.50
	4800	26-1/2	127,356.--
	100	26-3/8	2,640.75
	900	26-5/8	23,991.75
	500	26-5/8	13,328.75
	1600	26-3/4	42,852.--
	1100	26-7/8	29,598.25
	5000	27----	135,162.50
	2100	27----	56,768.25
	1300	27----	35,142.25
10/12/54	1000	26-1/2	26,532.50
	1000	26-3/8	26,407.50
10/13/54	500	26-1/2	13,266.25
10/14/54	600	26-5/8	15,994.50
	100	26-3/4	2,678.25
	100	26-3/4	2,678.25
	500	26-3/4	13,391.25
10/15/54	100	26-5/8	2,665.75
10/22/54	1300	26-5/8	34,654.75
	600	26-5/8	15,994.50
10/25/54	1000	26-1/2	26,532.50
	200	26-3/8	5,281.50
10/26/54	400	26-1/4	10,513.--
	800	26-3/8	21,126.--
	600	26-1/4	15,769.50
	200	26-1/8	5,231.50
	300	26----	7,809.75
10/27/54	300	26-1/8	7,847.25
	400	26-1/8	10,463.--
	1000	26----	26,032.50
10/29/54	500	26-3/8	13,203.75
	500	26-3/8	13,203.75
11/1/54	1000	26-1/4	26,282.50
	100	26-1/8	2,615.75
11/3/54	500	26-1/2	13,266.25
	500	26-1/2	13,266.25
11/4/54	500	26-1/2	13,266.25
	500	26-3/8	13,203.75
	200	26-1/4	5,256.50
	200	26-1/4	5,256.50
	100	26-1/4	2,628.25
11/5/54	700	26-1/4	18,397.75
	500	26-3/8	13,203.75
11/8/54	500	26-3/8	13,203.75
	500	26-1/2	13,266.25
	1500	26-1/2	39,798.75
11/9/54	2000	26-1/2	53,065.--

Trade Date	Shares Purchased	Price	Cost
11/9/54	600	26-3/8	15,844.50
	100	26-3/8	2,640.75
11/10/54	1000	26-3/8	26,407.50
	1000	26-1/2	26,532.50
	1000	26-1/2	26,532.50
11/11/54	500	26-3/4	13,391.25
11/12/54	500	26-3/4	13,391.25
11/15/54	4000	26-7/8	107,630.--
	50,000 shares		$1,330,800.--

12/8/54 — 50,000 Com. Held in Exch. for $1.20 Cumulative Preferred

RECEIVED BY
SECURITIES & EXCH. COMM.
Jan 10

FORM 4

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON 25, D. C.

The relation of the undersigned to the issuer is that of [1] DIRECTOR

IDENTIFICATION OF SECURITY (Such as Class "A" Common Stock, $6 Preferred Stock, etc.)	The following changes (whether by purchase, sale, exchange, gift, or otherwise) in the amounts of equity securities* of the above issuer owned by the undersigned occurred during the calendar month named above. (Report each transaction separately)			The undersigned owned directly or indirectly as beneficial owner, at the close of the calendar month named above, the following amounts of equity securities* of the above issuer	
	DATE OF TRANSACTION 1954	NUMBER OF SHARES OR UNITS OR PRINCIPAL AMOUNT — BOUGHT (If others so acquired, so indicate)	NUMBER OF SHARES OR UNITS OR PRINCIPAL AMOUNT — SOLD (If otherwise disposed of, so indicate)	NATURE OF OWNERSHIP (Whether direct or through holding company, partnership, etc.)	NUMBER OF SHARES OR UNITS OR PRINCIPAL AMOUNT OWNED AT CLOSE OF MONTH NAMED ABOVE
Common Stock	Dec. 8		90,000 •	(1)	300
$1.20 Cum. Pfd. Stock	" 8	90,000 ••		(1)	
do	" 9		1,400	(1)	48,600
do				Direct	None

• Exchanged for an equal number of shares of $1.20 Cumulative Preferred Stock pursuant to offer of exchange dated October 22, 1954.

•• Received in exchange for Common Stock.

(1) Transactions and holdings of Lehman Brothers a partnership of which I am a member. I have previously waived all interests in a total of 90,000 of these shares.

JOSEPH S. THOMAS

REMARKS:

By [signature] Agent in Fact
(Signature)

Date of report January 7, 1955

One copy of this report should be sent to the Securities and Exchange Commission. One copy should also be sent to each exchange on which any equity security of the issuer is listed unless the issuer has designated a single exchange to receive reports.

---

[1] Indicate whether an officer (giving title of office), director, or direct or indirect beneficial owner of more than 10 percent of any class of any equity security (giving name of security), or any combination of these.

*The term "equity security" means any stock or similar security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right. (Section 3 (a) (11) Securities Exchange Act.)

(SEE INSTRUCTIONS ON BACK)

Trade Date	Shares Sold	Price	Proceeds
12/9/54	1300	27-1/8	35,148.04
	100	27-1/4	2,716.19
1955			
1/5/55	22000	27----	591,348.12
1/13/55	2000	27-5/8	55,073.89
1/21/55	400	27-1/2	10,964.78
1/25/55	600	27-1/2	16,447.17
1/28/55	600	27-5/8	16,522.16
1/31/55	100	27-5/8	2,753.69
2/1/55	300	27-5/8	8.261.08
2/2/55	2000	27-5/8	55,073.89
	700	27-5/8	19,275.86
2/3/55	900	27-5/8	24,812.50
	1600	27-5/8	44,059.11
2/4/55	2400	27-5/8	66,088.67
2/9/55	1000	27-1/2	27,411.95
2/10/55	100	27-5/8	2,753.69
	900	27-1/2	24,670.75
2/11/55	700	27-5/8	19,275.86
	500	27-1/2	13,705.97
	100	27-5/8	2,753.69
2/14/55	500	27-1/2	13,705.97
	500	27-5/8	13,768.47
2/15/55	200	27-5/8	5,507.38
	700	27-1/2	19,188.36
2/16/55	1300	27-5/8	35,798.03
2/17/55	1000	27-1/2	27,411.95
2/18/55	200	27-1/2	5,482.38
	300	27-1/2	8,223.58
2/24/55	1000	27-1/2	27,411.95
3/2/55	400	27-5/8	11,014.77
	500	27-1/2	13,705.97
3/3/55	1600	27-5/8	44,059.11
3/4/55	300	27-3/4	8,298.58
3/7/55	200	27-5/8	5,507.38
	2000	27-3/4	55,323.89
3/8/55	1000	27-3/4	27,661.94
			$1,361,186.77

Revision of December 1, 1939

(DO NOT USE THIS SPACE)

FORM 4

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON 25, D. C.

IF THERE HAVE BEEN ANY *CHANGES* IN OWNERSHIP OF ANY EQUITY SECURITY OF THE COMPANY NAMED BELOW DURING THE LAST CALENDAR MONTH, THIS FORM SHOULD BE FILED BY OFFICERS AND DIRECTORS OF SUCH COMPANY IF IT HAS EQUITY SECURITIES LISTED AND REGISTERED, AND BY BENEFICIAL OWNERS OF MORE THAN 10 PERCENT OF ANY CLASS OF LISTED AND REGISTERED EQUITY SECURITIES OF SUCH COMPANY

Report for Calendar Month Ending January 31, 1955

THE WHITE ASSOCIATED OIL COMPANY INCORPORATED

(Name of company which issued security)

JOSEPH A. THOMAS

(Name of person whose change of ownership is reported) (Type or print)

284 WILLIAM STREET, NEW YORK 38, NEW YORK

(Business address: street, city, State)

The relation of the undersigned to the issuer is that of [1] DIRECTOR

IDENTIFICATION OF SECURITY (Such as Class "A" Common Stock, 5% Preferred Stock, etc.)	The following changes (whether by purchase, sale, exchange, gift or otherwise) in the amounts of equity securities of the above issuer owned by the undersigned reported during the calendar month named above. (Report each transaction separately)			The undersigned owned directly or indirectly (as beneficial owner, at the close of the calendar month named above, the following amounts of equity securities of the above issuer	
	Date or Transaction 1955	NUMBER OF SHARES OR UNITS OR PRINCIPAL AMOUNT: BOUGHT (If otherwise reported, so indicate)	NUMBER OF SHARES OR UNITS OR PRINCIPAL AMOUNT: SOLD (If otherwise disposed of, so indicate)	Nature of Ownership (Whether direct or through family, trust, company, partnership, etc.)	Number of Shares or Units or Principal Amount Owned of Class or Security Named Above
Common Stock				(1)	200
$1.20 Cum. Pfd. Stock	Jan. 5		20,000		
do	" 13		2,000		
do	" 21		600		
do	" 25		600		
do	" 28		600		
do	" 31		100		22,000
do				Direct	None

(1) Transactions & holdings of Lehman Brothers a partnership of which I am a member. I have previously waived all interests in a total of 22,000 of these shares.

JOSEPH A. THOMAS

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SECURITIES & EXCH. COMM.
10/10/54

FORM 4

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON 25, D. C.

IF THERE HAVE BEEN ANY *CHANGES* IN OWNERSHIP OF ANY EQUITY SECURITY OF THE COMPANY NAMED BELOW DURING THE LAST CALENDAR MONTH, THIS FORM SHOULD BE FILED BY OFFICERS AND DIRECTORS OF SUCH COMPANY IF IT HAS EQUITY SECURITIES LISTED AND REGISTERED, AND BY BENEFICIAL OWNERS OF MORE THAN 10 PERCENT OF ANY CLASS OF LISTED AND REGISTERED EQUITY SECURITIES OF SUCH COMPANY

Report for Calendar Month Ending October 30 1954

~~TEXAS ASSOCIATES OF DELAWARE INCORPORATED~~

JOSEPH A. THOMAS
(Name of person whose change of ownership is reported) (Type or print)

~~ONE WILLIAM STREET, NEW YORK, NEW YORK~~
(Business address: Street, City, State)

The relation of the undersigned to the issuer is that of [1] DIRECTOR

IDENTIFICATION OF SECURITY (Such as Class "A" Common Stock, 5% Preferred Stock, etc.)	The following changes (whether by purchase, sale, exchange, gift, or otherwise) in the amounts of equity securities[2] of the above issuer owned by the undersigned occurred during the calendar month named above. (Report each transaction separately)			The undersigned owned directly or indirectly as beneficial owner, at the close of the calendar month named above, the following amounts of equity securities[2] of the above issuer	
	Date of Transaction 1954	Number of Shares or Units or Principal Amount: Bought (If otherwise acquired, so indicate)	Number of Shares or Units or Principal Amount: Sold (If otherwise disposed of, so indicate)	Nature of Ownership (Whether direct or through holding company, partnership, etc.)	Number of Shares or Units or Principal Amount Owned at Close of Month Named Above
Common Stock	Oct. 8	20,000			
do	12	2,000			
do	13	900			
do	14	1,300			
do	15	100			
do	22	1,900			
do	25	1,200			
do	26	2,300			
do	27	1,700			
do	29	1,000			32,300
do				Direct	None

(1) Transactions and holdings of Lehman Brothers, a partnership of which I am a member. I have waived all interests in the purchase of the above shares, amounting to 32,000 shares.

REMARKS:

JOSEPH A. THOMAS

In relation of the undersigned to the issuer is that of [redacted]

[redacted]

IDENTIFICATION OF SECURITY (Such as Class "A" Common Stock, 6% Preferred Stock, etc.)	[redacted]	[redacted]		[redacted]	[redacted]
		[redacted]	[redacted]		
[redacted]	[redacted]	[redacted]		[redacted]	[redacted]

[redacted] amounting to 3[redacted] shares.

Remarks: [redacted]

[redacted]

By [redacted] Agent for Bank

Date of report [redacted]

One copy of this report should be sent to the Securities and Exchange Commission. [redacted] to each exchange on which any equity security of the issuer is listed unless the issuer has designated [redacted] to receive reports.

[1] Indicate whether an officer (giving title of office), director, or direct or indirect beneficial owner of more than 10 percent of any class of any equity security (giving name of security), or any combination of them.

[2] The term "equity security" means any stock or similar security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right. (Section 3 (a) (11) Securities Exchange Act.)

[redacted]

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[illegible]
12/9/54

FORM 4

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON 25, D. C.

IF THERE HAVE BEEN ANY CHANGES IN OWNERSHIP OF ANY EQUITY SECURITY OF THE COMPANY NAMED BELOW DURING THE LAST CALENDAR MONTH, THIS FORM SHOULD BE FILED BY OFFICERS AND DIRECTORS OF SUCH COMPANY IF IT HAS EQUITY SECURITIES LISTED AND REGISTERED, AND BY BENEFICIAL OWNERS OF MORE THAN 10 PERCENT OF ANY CLASS OF LISTED AND REGISTERED EQUITY SECURITIES OF SUCH COMPANY

Report for Calendar Month Ending [illegible], 1954

[illegible]
(Name of company whose securities are involved)

[illegible]
(Name of person whose change of ownership is reported) (Type or print)

[illegible]
(Business address: Street, City, State)

The relation of the undersigned to the issuer is that of [1] ....

[illegible]

IDENTIFICATION OF SECURITY (Such as "Class "A" Common Stock, 5% Preferred Stock, etc.)	Date of Change (Month) 1954	Amount of Shares or Units of Principal Amount — Bought (If acquired other than by purchase, so indicate)	Amount of Shares or Units of Principal Amount — Sold (If disposed of other than by sale, so indicate)	Nature of Ownership	Number of Shares or Units of Principal Amount Owned at Close of Month Stated Above
Common Stock	Dec. [illegible]	[illegible]		(1)	
do	[illegible]	[illegible]		(1)	
do	[illegible]	[illegible]		(1)	
do	[illegible]	[illegible]		(1)	
do	[illegible]	[illegible]		(1)	
do	[illegible]	[illegible]		(1)	
do	[illegible]	[illegible]		(1)	
do	[illegible]	[illegible]		(1)	
do	[illegible]	[illegible]		(1)	
do	[illegible]	[illegible]		(1)	[illegible]
do				Direct	None

(1) Transactions and holdings of Lehman Brothers a partnership of which I am a member. I have waived all interests in the purchase of the above shares amounting to [illegible] shares.

(2) I have waived all interests in a total of [illegible] of these shares.

REMARKS: JOSEPH A. THOMAS

Revision of December 1, 1935

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DIRECTOR

IDENTIFICATION OF SECURITY (Such as Class "A" Common Stock, 6% Preferred Stock, etc.)	The following changes (whether by purchase, sale, exchange, gift, or otherwise) in the amounts of equity securities of the above issue owned by the undersigned occurred during the calendar month named above. (Report each transaction separately)			The undersigned owned directly or indirectly or beneficially owned, at the close of the calendar month named above, the following amounts of equity securities* of the above issue
	Date of Transaction 1934	Number of Shares or Units Purchased (If shares or other units purchased, so indicate)	Number of Shares or Units Sold (If otherwise disposed of, so indicate)	Nature of Ownership (Whether owned directly or through holding company, partnership, etc.)	Number of Shares or Units as Reported Above Owned at Close of Month Named Above
Common Stock	Dec. 1	1,100		Direct	30,300
"	3	1,000		"	
"	4	1,200		"	
"	5	1,300		"	
"	6	1,400		"	
"	10	900		"	
"	11	900		"	
"	12	4,000		"	

(1) Transactions and holdings of Lehman Brothers a partnership of which I am a member. I have waived all interests in the purchase of the above shares amounting to 18,000 shares.

I have waived all interests in a total of 30,000 of these shares.

REMARKS:

JOSEPH A. THOMAS

By _____ Agent in Fact

(Signature)

Date of report December 7, 1934

One copy of this report should be sent to the Securities and Exchange Commission. One copy should also be sent to each exchange on which any equity security of the issuer is listed unless the issuer has designated a single exchange to receive reports.

* Indicate whether an officer (giving title of office), director, or direct or indirect beneficial owner of more than 10 percent of a class of any equity security (giving name of security), or any combination of these.

* The term "equity security" means any stock or similar security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right. (Section 3 (a) (11) Securities Exchange Act.)

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1/10/55

FORM 4

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON 25, D. C.

IF THERE HAVE BEEN ANY *CHANGES* IN OWNERSHIP OF ANY EQUITY SECURITY OF THE COMPANY NAMED BELOW DURING THE LAST CALENDAR MONTH, THIS FORM SHOULD BE FILED BY OFFICERS AND DIRECTORS OF SUCH COMPANY IF IT HAS EQUITY SECURITIES LISTED AND REGISTERED, AND BY BENEFICIAL OWNERS OF MORE THAN 10 PERCENT OF ANY CLASS OF LISTED AND REGISTERED EQUITY SECURITIES OF SUCH COMPANY

Report for Calendar Month Ending December 31, 1954

THE NATIONAL ASSOCIATED OIL COMPANY INCORPORATED
(Name of company which issued security)

JOSEPH A. THREAT
(Name of person whose change of ownership is reported) (Type of case)

ONE WILLIAM STREET, NEW YORK 4, NEW YORK
(Business address: street, city, State)

The relation of the undersigned to the issuer is that of: DIRECTOR

IDENTIFICATION OF SECURITY (Such as Class "A" Common Stock, 5% Preferred Stock, etc.)	The following changes (whether by purchase, sale, exchange, gift, or otherwise) in the amounts of equity securities of the above issue owned by the undersigned occurred during the calendar month named above. (Report each transaction separately)			The undersigned owned directly or indirectly as beneficial owner, at the close of the calendar month named above, the following amounts of equity securities of the above issue	
	Date of Transaction 1954	Number of Shares or Units or Principal Amount: BOUGHT (If others so acquired, so indicate)	Number of Shares or Units or Principal Amount: SOLD (If otherwise disposed of, so indicate)	Nature of Ownership (Whether direct or through holding company, partnership, etc.)	Number of Shares or Units or Principal Amount Owned at Close of Month Named Above
Common Stock	Dec. 8		90,000 •	(1)	300
$1.20 Cum. Pfd. Stock	• 8	90,000 ••		(1)	
do	• 9		1,400	(1)	48,600
do				Direct	None

• Exchanged for an equal number of shares of $1.20 Cumulative Preferred Stock pursuant to offer of exchange dated October 22, 1954.

•• Received in exchange for Common Stock.

(1) Transactions and holdings of Lehman Brothers a partnership of which I am a member. I have previously waived all interests in a total of 90,000 of these shares.

JOSEPH A. THREAT

Page one

Revision of December 1, 1935

(DO NOT USE THIS SPACE)

(Business address: street, city, state)

The relation of the undersigned to the issuer is that of [1] DIRECTOR

IDENTIFICATION OF SECURITY (Such as Class "A" Common Stock, 5% Preferred Stock, etc.)	The following changes (exclusive of purchase, sale, exchange, gift, or otherwise) in the amounts of equity securities of the above issuer owned by the undersigned occurred during the calendar month named above. (Report each transaction separately)			The undersigned owned directly or indirectly as beneficial owner, at the close of the calendar month named above, the following amounts of equity securities* of the above issuer
	Date or Transaction 1935	NUMBER OF SHARES OR UNITS OR PRINCIPAL AMOUNT		Nature of Ownership (Whether direct or indirect, and if indirect, the nature thereof, i.e., whether by trust, corporation, partnership, etc.)	Number or Shares or Units or Principal Amount Owned at Close of Month Named Above
		BOUGHT (If otherwise acquired, so indicate)	SOLD (If otherwise disposed of, so indicate)		
Common Stock				(1)	200
$1.20 Cum. Pfd. Stock	Jan. 9		20,000		
do	" 17		2,000		
do	" 23		600		
do	" 28		600		
do	" 31		200		22,900
do				Direct	Same

(1) Transactions & holdings of Lehman Brothers a partnership of which I am a member. I have previously waived all interests in a total of 22,800 of these shares.

REMARKS:

JOSEPH A. THOMAS

By Philip E. Lehman Agent in Fact

Date of report February 9, 1935

One copy of this report should be sent to the Securities and Exchange Commission. One copy should also be sent to each exchange on which any equity security of the issuer is listed unless the issuer has designated a single exchange to receive reports.

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[1] Indicate whether an officer (giving title of office), director, or direct or indirect beneficial owner of more than 10 percent of any class of any equity security (giving name of security), or any combination of them.

*The term "equity security" means any stock or similar security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right. (Section 3 (a) (11) Securities Exchange Act.)

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FORM 4

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON 25, D. C.

IF THERE HAVE BEEN ANY CHANGES IN OWNERSHIP OF ANY EQUITY SECURITY OF THE COMPANY NAMED HEREIN DURING THE LAST CALENDAR MONTH, THIS FORM SHOULD BE FILED BY DIRECTORS AND REGISTERED OWNERS OF OVER 10% OF ANY EQUITY SECURITIES LISTED AND REGISTERED, AND BY OFFICIAL OFFICERS OF EVERY KIND IN RESPECT OF ANY CLASS OF LISTED AND REGISTERED EQUITY SECURITIES OF SUCH COMPANY

Report for Calendar Month Ending January 31, 1935

[redacted]

The relation of the undersigned to the issuer is that of [redacted]

IDENTIFICATION OF SECURITY	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

(a) [redacted]

REMARKS:

Revised as of December 1, 1939

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FORM 4

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON 25, D. C.

[redacted]

DIRECTOR

IDENTIFICATION OF SECURITY (Such as (Title "A" Common Stock, 6% Preferred Stock, etc.)	The following changes (whether by purchase, sale, exchange, gift, or otherwise) in the amounts of equity securities[1] of the above issuer owned by the undersigned occurred during the calendar month named above. (Report each transaction separately)			The undersigned owned directly or indirectly as beneficial owner, at the close of the calendar month named above, the following amounts of equity securities[1] of the above issuer	
	Date of Transaction 1938	NUMBER OF SHARES OR UNITS OR PRINCIPAL AMOUNT		Nature of Ownership (Whether direct or through holding company, partnership, etc.)	Number of Shares or Units or Principal Amount Owned at Close of Month Named Above
		BOUGHT (If otherwise acquired, so indicate)	SOLD (If otherwise disposed of, so indicate)		
[redacted]	Feb. 1		300	[redacted]	6,000
	2		2,700		None
	3		2,300		
	4		2,400		
	5		2,000		
	6		2,000		
	7		2,000		
	8		2,000		
	9		2,000		
	10		2,000		
	11		2,000		
	12		2,000		
	13		2,000		
	14		2,000		
	15		2,000		
	16		2,000		
	17		2,000		
	18		2,000		
	19		2,000		
	20		2,000		
	21		2,000		
	22		2,000		
	23		2,000		
	24		2,000		
	25		2,000		
	26		2,000		
	27		2,000		
	28		2,000		
Common Stock				[redacted]	300
				[redacted]	None

(1) Transactions and holdings of Lehman Brothers a partnership of which I am a partner. I have previously waived all interests in a total of [redacted] of these shares.

[redacted]

REMARKS:

By [redacted] Agent in Fact
(Signature)

Date of report March 7, 1938

One copy of this report should be sent to the Securities and Exchange Commission. One copy should also be sent to each exchange on which any equity security of the issuer is listed unless the issuer has designated a single exchange to receive reports.

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[1] Indicate whether an officer (giving title of office), director, or direct or indirect beneficial owner of more than 10 percent of any class of any equity security (giving name of security), or any combination of these.

"The term "equity security" means any stock or similar security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right. (Section 3 (a) (11) Securities Exchange Act.)

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4-6-55

FORM 4

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON 25, D. C.

IF THERE HAVE BEEN ANY *CHANGES* IN OWNERSHIP OF ANY EQUITY SECURITY OF THE COMPANY NAMED BELOW DURING THE LAST CALENDAR MONTH, THIS FORM SHOULD BE FILED BY OFFICERS AND DIRECTORS OF SUCH COMPANY IF IT HAS EQUITY SECURITIES LISTED AND REGISTERED, AND BY BENEFICIAL OWNERS OF MORE THAN 10 PERCENT OF ANY CLASS OF LISTED AND REGISTERED EQUITY SECURITIES OF SUCH COMPANY

Report for Calendar Month Ending March 31, 1955

TIDE WATER ASSOCIATED OIL COMPANY INCORPORATED
(Name of company which issued security)

JOSEPH A. THOMAS
(Name of person whose change of ownership is reported) (Type or print)

ONE WILLIAM ST. BET, NEW YORK 4, NEW YORK
(Business address: street, city, State)

The relation of the undersigned to the issuer is that of[1]

DIRECTOR

IDENTIFICATION OF SECURITY (Such as Class "A" Common Stock, $6 Preferred Stock, etc.)	The following changes (whether by purchase, sale, exchange, gift, or otherwise) in the amounts of equity securities* of the above issuer owned by the undersigned occurred during the calendar month named above. (Report each transaction separately)			The undersigned owned directly or indirectly as beneficial owner, at the close of the calendar month named above, the following amounts of equity securities* of the above issuer	
	Date of Transaction 1955	Number of Shares or Units or Principal Amount: Bought (If otherwise acquired, so indicate)	Sold (If otherwise disposed of, so indicate)	Nature of Ownership (Whether direct or through holding company, partnership, etc.)	Number of Shares or Units or Principal Amount Owned at Close of Month Named Above
$1.20 Cum. Pfd. Stock	March 2		900	(1)	
do	" 3		1,600	(1)	
do	" 4		300	(1)	
do	" 7		2,200	(1)	
do	" 8		1,000	(1)	None
do				Direct	None
Common Stock				(1)	300
do				Direct	None

(1) Transactions and holdings of Lehman Brothers a partnership of which I am a partner. I have previously waived all interests in a total of 50,000 of these shares.

JOSEPH A. THOMAS

Remarks:

1

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FORM 4

TIDE WATER ASSOCIATED OIL COMPANY INCORPORATED

(Name of company which issued security)

JOSEPH A. THOMAS

(Name of person whose change of ownership is reported) (Type or print)

ONE WILLIAM ST. BLDG., NEW YORK 4, NEW YORK

(Business address: street, city, State)

The relation of the undersigned to the issuer is that of [1] DIRECTOR

IDENTIFICATION OF SECURITY (such as Class "A" Common Stock, $6 Preferred Stock, etc.)	The following changes (whether by purchase, sale, exchange, gift, or otherwise) in the amounts of equity securities* of the above issuer owned by the undersigned occurred during the calendar month named above. (Report each transaction separately.)			The undersigned owned directly or indirectly as beneficial owner, at the close of the calendar month named above, the following amounts of equity securities* of the above issuer	
	DATE OF TRANSACTION 1955	NUMBER OF SHARES OR UNITS OR PRINCIPAL AMOUNT		NATURE OF OWNERSHIP (Whether direct or through holding company, partnership, etc.)	NUMBER OF SHARES OR UNITS OR PRINCIPAL AMOUNT OWNED AT CLOSE OF MONTH NAMED ABOVE
		BOUGHT (If otherwise acquired, so indicate)	SOLD (If otherwise disposed of, so indicate)		
$1.20 Cum. Pfd. Stock	March 2		900	(1)	
do	" 3		1,600	(1)	
do	" 4		300	(1)	
do	" 7		2,200	(1)	
do	" 8		1,000	(1)	None
do				Direct	None
Common Stock				(1)	300
do				Direct	None

(1) Transactions and holdings of Lehman Brothers a partnership of which I am a partner. I have previously waived all interests in a total of 50,000 of these shares.

REMARKS:

JOSEPH A. THOMAS

By /

Agent in Fact

(Signature)

Date of report April 7, 1955

One copy of this report should be sent to the Securities and Exchange Commission. One copy should also be sent to each exchange on which any equity security of the issuer is listed unless the issuer has designated a single exchange to receive reports.

[1] Indicate whether an officer (giving title of office), director, or direct or indirect beneficial owner of more than 10 percent of any class of any equity security (giving name of security), or any combination of these.

*The term "equity security" means any stock or similar security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right. (Section 3 (a) (11) Securities Exchange Act.)

(SEE INSTRUCTIONS ON BACK)

TIDE WATER ASSOCIATED OIL COMPANY

17 Battery Place

New York 4, N. Y.

October 22, 1954

To the Stockholders of

Tide Water Associated Oil Company:

You were advised on April 29th of this year that your Corporation has undertaken and is carrying on a comprehensive coordinated program of expansion and modernization calling for large expenditures and designed to increase its reserves of crude oil and natural gas, to add to and modernize its refining facilities and to improve its marketing position. As stated at that time the Board of Directors concluded it to be advisable to finance the expansion and modernization program largely out of current cash earnings, with the result that the amount of cash earnings available for dividends will be greatly reduced. Accordingly, no cash dividends were declared for the second and third quarters of this year. A 5% stock dividend was distributed on June 23, 1954.

While most of the stockholders appear to be content to forego cash dividends in return for the possibility of greater earnings and values which should result from the capital expenditures necessitated by the program of expansion and modernization, some stockholders have expressed their desire to receive cash dividends in an amount at least as large as those previously received. The management of the Corporation has studied the matter and has evolved a Plan of Recapitalization whereby all the stockholders, other than Mission Development Company, Mission Corporation, and Pacific Western Oil Corporation, which corporations together own approximately 53% of the outstanding Common Stock, will be given the opportunity to exchange their Common Stock for a Cumulative Preferred Stock (hereinafter called "Preferred Stock") which will carry dividends at the rate of $1.20 annually.

In order to make possible the Plan, Mission Development Company, Mission Corporation, and Pacific Western Oil Corporation have agreed to waive and forego any right to exchange the Common Stock held by them for such Preferred Stock.

This Plan will permit those stockholders who so desire, to receive cash dividends at a rate slightly higher than the highest dividends paid on the Common Stock in any year, by exchanging their Common Stock for such Preferred Stock, and at the same time will permit those stockholders who place a greater value on future growth possibilities to retain their Common Stock with full knowledge that it is likely that no cash dividends will be paid thereon for a number of years or if paid, that such dividends will be small in comparison with dividends paid on the Common Stock in prior years. The Board of Directors has concluded this to be preferable, rather than to pay greatly reduced dividends to all stockholders. The Corporation may, of course, distribute further stock dividends on the Common Stock in the future. Those stockholders who desire both cash dividends and the opportunity to share in future growth may, of course, exchange only a portion of the stock held by them and retain a portion of their Common Stock.

In order to put the Plan into effect it is necessary to amend the Certificate of Incorporation to provide for the creation of the Preferred Stock and to obtain the consent of the holders of a

1

majority of the Common Stock outstanding to the issuance of the Preferred Stock pursuant to the Plan. A meeting has been called for these purposes and in order to permit the stockholders to vote on the proposed Plan of Recapitalization.

There are enclosed herewith the following documents:

1. Notice of Special Meeting of Stockholders to be held on November 15, 1954;
2. Proxy Statement, having attached thereto the Plan of Recapitalization and the proposed amended Article ELEVENTH of the Certificate of Incorporation. The proposed amended Article FOURTH of the Certificate of Incorporation is annexed to the Plan of Recapitalization;
3. Form of Proxy for signature and return, together with postage prepaid return envelope;
4. Offer of Exchange, and
5. Letter of Transmittal for those stockholders who wish to take advantage of the Offer of Exchange, together with an envelope addressed to The Chase National Bank of the City of New York, Exchange Agent, 11 Broad Street, New York 15, N. Y.

You are requested to read all the documents carefully before taking any action.

2

By order of the Board of Directors.

DAVID T. STAPLES,
President.

TIDE WATER ASSOCIATED OIL COMPANY
17 BATTERY PLACE
NEW YORK 4, N. Y.

OFFER OF EXCHANGE
Dated October 22, 1954

To the Stockholders of
TIDE WATER ASSOCIATED OIL COMPANY:

This Offer of Exchange is submitted together with the Notice of Stockholders Meeting and Proxy Statement. The Plan of Recapitalization dated October 7, 1954 is attached to the Proxy Statement. You are requested to read the Proxy Statement and the Plan of Recapitalization attached thereto carefully before taking any action with respect to this Offer of Exchange.

Pursuant to the Plan of Recapitalization above referred to, Tide Water Associated Oil Company (hereinafter called the "Corporation"), hereby offers to issue to such of the holders of Common Stock who so elect, other than Mission Development Company, Mission Corporation and Pacific Western Oil Corporation shares of $1.20 Cumulative Preferred Stock, $25 par value, (hereinafter sometimes referred to as "Preferred Stock") of the Corporation, in exchange for all shares of Common Stock of the Corporation surrendered for cancellation in accordance with this Offer of Exchange, in the ratio of one share of Preferred Stock for each share of Common Stock so surrendered, subject, however, to the formal approval of the Plan of Recapitalization and the proposed amendment to Article Fourth of the Certificate of Incorporation by the holders of a majority of the outstanding Common Stock at the meeting of stockholders called to be held on November 15, 1954 as set forth in the aforesaid notice of meeting accompanying this Offer of Exchange, or at any adjournment or adjournments thereof and subject to such Amendment's becoming effective.

DESCRIPTION OF PREFERRED STOCK AND INFORMATION CONCERNING THE BUSINESS, PROPERTY AND EARNINGS OF THE CORPORATION.

The exact nature of the Preferred Stock and the designations, powers, preferences and special rights and the qualifications, limitations and restrictions thereof are set forth in the proposed amended Article Fourth of the Certificate of Incorporation which is annexed to the Plan of Recapitalization attached to the Proxy Statement accompanying this Offer of Exchange. In addition, there is a summary thereof in the Proxy Statement.

The Proxy Statement contains in addition, information essential to assist you in determining whether to retain your Common Stock or to exchange it in whole or in part for Preferred Stock. This information includes, among other things, data concerning the business, property and earnings of the Corporation, certain financial statements and the effect which the issuance of the Preferred Stock will have upon the Common Stock.

DETAILS OF THE EXCHANGE OFFER

The exchange offer is open to all holders of the Corporation's Common Stock, other than Mission Development Company, Mission Corporation and Pacific Western Oil Corporation, from the date of this exchange offer until 3:30 p.m. Eastern Standard Time, December 8, 1954 (such period being hereinafter called the "Exchange Period"). Any holder of the Corporation's Common Stock, other than Mission Development Company, Mission Corporation and Pacific Western Oil Corporation, may accept this exchange offer and deposit for exchange all or any number of the shares of Common Stock held by him. Any such stockholder may revoke his acceptance of this exchange offer and direct return of the deposited shares by giving notice thereof which shall be received by the Exchange

Agent at any time prior to 3:30 p.m. Eastern Standard Time, December 8, 1954. There may be no revocation thereafter.

Should the holders of a majority of outstanding Common Stock not give their formal approval to the Plan of Recapitalization and the proposed amendments to the Certificate of Incorporation at the meeting called to be held on November 15, 1954, this exchange offer shall become void and of no effect and the Corporation will in such event instruct the Exchange Agent to return to each common stockholder any shares of Common Stock deposited with the Exchange Agent by such stockholder.

Certificates for Preferred Stock, either in permanent or temporary form, will be delivered in exchange for the deposited shares of Common Stock, either against counter receipt or by mailing by registered mail as soon as practicable after the close of the Exchange Period. No Preferred Stock will be delivered prior to the close of the Exchange Period.

All shares of Common Stock which are exchanged will be cancelled and retired by the Corporation.

METHOD OF EFFECTING EXCHANGES

The Chase National Bank of the City of New York, 11 Broad Street, New York 15, N. Y., has been appointed Exchange Agent for this transaction. Common stockholders desiring to effect the exchange under this exchange offer should execute the accompanying Letter of Transmittal and forward it to the Exchange Agent, together with the stock certificates representing the shares to be exchanged. An envelope addressed to the Exchange Agent is enclosed for the convenience of stockholders desiring to effect such exchange. Letters of Transmittal and stock certificates properly endorsed or accompanied by an appropriate instrument described in the Instructions appearing on the back of the Letter of Transmittal, must be received by the Exchange Agent not later than 3:30 p. m. Eastern Standard Time on December 8, 1954.

FEDERAL INCOME TAX RESULTS TO COMMON STOCKHOLDERS

The Corporation is advised by counsel that, pending issuance of Regulations under the Internal Revenue Code of 1954, it may not be possible to obtain from the Commissioner of Internal Revenue a specific ruling on the transaction, but that in the opinion of such counsel no gain or loss will be recognized to present holders of Common Stock for Federal Income Tax purposes under the Internal Revenue Code of 1954 by reason of the receipt of Preferred Stock in exchange for their Common Stock pursuant to the Plan of Recapitalization under this exchange offer.

PROPOSED LISTING ON THE NEW YORK STOCK EXCHANGE

Application is being made for the listing of the Preferred Stock on the New York Stock Exchange. The Corporation is advised that whether such Preferred Stock will be accepted for listing will depend upon the number of stockholders who exchange their Common Stock for Preferred Stock. Application is also being made to the New York Stock Exchange for the admission to trading on the New York Stock Exchange of the Preferred Stock on a when-issued basis. The Corporation is advised that if the Preferred Stock is so admitted to trading on a when-issued basis, such trading will not commence until after the approval of the Plan of Recapitalization and the proposed amendments to the Certificate of Incorporation by the stockholders at the Stockholders' Meeting called to be held November 15, 1954.

ADDITIONAL COPIES OF EXCHANGE OFFER

Additional copies of the Offer of Exchange and the Notice of Stockholders Meeting and Proxy Statement may be secured in reasonable numbers from The Chase National Bank of the City of New York, 11 Broad Street, New York 15, N. Y., the Corporation's office at 17 Battery Place, New York 4, N. Y. and the Corporation's office at 79 New Montgomery Street, San Francisco 20, California.

By order of the Board of Directors.

DAVID T. STAPLES,
President.

TIDE WATER ASSOCIATED OIL COMPANY
17 Battery Place
New York 4, N. Y.

NOTICE OF MEETING AND PROXY STATEMENT

Notice of Special Meeting of Stockholders
November 15, 1954

To the Stockholders of
Tide Water Associated Oil Company:

Please Take Notice that a Special Meeting of the stockholders of Tide Water Associated Oil Company, a Delaware corporation, hereinafter called the "Corporation", has been duly called by the Board of Directors to be held at the Hotel Roosevelt, Madison Avenue and 45th Street, New York, N. Y., on Monday, November 15, 1954, at 10:00 o'clock in the forenoon Eastern Standard Time, for the following purposes:

(1) To consider and act on a proposed amendment to Article FOURTH of the Certificate of Incorporation of the Corporation, which amendment has heretofore been declared advisable by the Board of Directors of the Corporation, to create and authorize the issuance of 6,300,000 shares of $1.20 Cumulative Preferred Stock, $25 par value each (hereinafter called "Preferred Stock"), in lieu of the presently authorized preferred stock without par value now provided for therein and to set forth the designation and the powers, preferences and special rights and the qualifications, limitations and restrictions thereof. The form of proposed amended Article FOURTH is set forth in Exhibit A to the Plan of Recapitalization (Exhibit 1, to the Proxy Statement attached hereto).

(2) To consider and act on a proposed Amendment to Article ELEVENTH of the Certificate of Incorporation of the Corporation, which Amendment has heretofore been declared advisable by the Board of Directors of the Corporation, to conform said Article ELEVENTH to the proposed Amendment to Article FOURTH of said Certificate of Incorporation insofar as it requires the consent of the holders of a majority of the outstanding Common Stock of the Corporation entitled to vote for the issuance of any shares of Preferred Stock or, on or after November 15, 1954, of any shares of Common Stock. The form of said amended Article ELEVENTH is set forth in Exhibit 2 to the Proxy Statement attached hereto.

(3) To consider and act on a proposed Plan of Recapitalization set forth in Exhibit 1 to the Proxy Statement attached hereto, which provides, among other things, for the creation of 6,300,000 shares of Preferred Stock, and for the making of an offer to the holders of the outstanding Common Stock of the Corporation, other than Mission Development Company, Mission Corporation and Pacific Western Oil Corporation, to exchange all or any part of the Common Stock held by such stockholders for shares of Preferred Stock on a share for share basis.

(4) To consider and act on the authorization and approval of, and consent to the issuance of the Preferred Stock pursuant to the Plan of Recapitalization in accordance with said amended Article ELEVENTH of the Certificate of Incorporation.

(5) To transact such other business as may properly come before the meeting or any adjournment or adjournments thereof.

Enclosed is a form of proxy prepared and sent to you at the direction of the Board of Directors of the Corporation.

The transfer books of the Corporation will not be closed, but in lieu thereof the Board of Directors has fixed the close of business on October 20, 1954, as the record date for the determination of stockholders entitled to notice of and to vote at the meeting and at any adjournment or adjournments thereof.

Respectfully submitted,

Dated: October 22, 1954

BY ORDER OF THE BOARD OF DIRECTORS

William J. Burker
Secretary

TIDE WATER ASSOCIATED OIL COMPANY

Proxy Statement

This statement is furnished in connection with the solicitation of proxies to be used at a special meeting of the stockholders of Tide Water Associated Oil Company, a Delaware corporation (hereinafter sometimes called the "Corporation") to be held on November 15, 1954.

Proxies in the form enclosed herewith are solicited by the Management at the direction of the Board of Directors of the Corporation and the cost of solicitation is to be borne by the Corporation.

Any stockholder giving a proxy in such form has the power to revoke it at any time prior to the voting thereof. Unless so revoked the shares represented thereby will be voted at said special meeting, and at any and all adjournments thereof and, if any directions are indicated thereon by the stockholder, will be voted in accordance with such directions, if the proxy is returned properly executed and is received in time for voting.

The Corporation had outstanding at the close of business October 20, 1954, the record date for the determination of stockholders entitled to vote at the meeting, 13,433,299 shares of $10 par value Common Stock, each of which is entitled to one vote.

DESCRIPTION OF MATTERS TO BE ACTED ON

Plan of Recapitalization

The Board of Directors is submitting to the stockholders for their consideration and to be acted on a proposed Plan of Recapitalization (Exhibit 1 hereto), which provides in substance as follows:

(1) For the creation of 6,300,000 shares of $1.20 Cumulative Preferred Stock, $25 par value each (hereinafter called "Preferred Stock"), in lieu of and in substitution for the 873,779 shares of preferred stock without par value (hereinafter called "Old Preferred"), presently authorized, and none of which is outstanding. The designations, preferences and special rights, and the qualifications, limitations and restrictions of such Preferred Stock are set forth in the proposed Amendment to Article Fourth of the Certificate of Incorporation, Exhibit A to the Plan of Recapitalization and are summarized hereinafter under the heading "Preferred Stock."

(2) For the making of an offer to the holders of the outstanding Common Stock, $10 par value of the Corporation (hereinafter called "Common Stock"), of the privilege until 3:30 P.M. Eastern Standard Time on December 8, 1954, of surrendering all or any part of the shares of such Common Stock owned by them for cancellation in exchange for the issuance to them of shares of such Preferred Stock in the ratio of one share of such Preferred Stock for each share of Common Stock surrendered and for the cancellation and retirement after the termination of the period of exchange of each share of such Common Stock so surrendered. Such offer will not be available to Mission Development Company, Mission Corporation, or Pacific Western Oil Corporation which, together own and hold approximately 53% of the presently issued and outstanding Common Stock of the Corporation. Any stockholder may revoke his acceptance of such offer and direct the return of his shares surrendered by giving notice thereof, which shall be received prior to 3:30 P.M. E. S. T. December 8, 1954. No revocation will be permitted thereafter.

(3) For the transfer to the Preferred Stock Capital Account to be set up on the books of the Corporation, in respect of each share of Preferred Stock issued in exchange for Common Stock, of the sum of $25, by transferring to such Preferred Stock Capital Account from Common Stock Capital Account in respect of each share of Common Stock received by the Corporation for exchange and surrendered for cancellation and retirement, the sum of $10, presently set up on the books as the capital in respect of each share of such Common Stock, and by transferring from the Retained Profits Reinvested Account to the Preferred Stock Capital Account in respect of each such share of Preferred Stock so issued the sum of $15, so that the Preferred Stock Capital Account shall equal $25 for each share of Preferred Stock so issued.

The Plan of Recapitalization summarized above is set forth in full in Exhibit 1 hereto, to which reference is made for full and complete statements of the provisions of such Plan of Recapitalization.

The vote of the holders of a majority of Common Stock issued and outstanding on the record date is deemed necessary for approval of the Plan of Recapitalization. The management of the Corporation has not set, and does not intend to set, any minimum percentage of favorable votes of shares of Common Stock held by persons other than Mission Development Company, Mission Corporation and Pacific Western Oil Corporation as a prerequisite to proceeding with the Plan of Recapitalization.

The Offer of Exchange is being mailed herewith to each holder of Common Stock of the Corporation of record at the close of business October 20, 1954. Such offer is open to all holders of Common Stock of the Corporation, except Mission Development Company, Mission Corporation and Pacific Western Oil Corporation, until 3:30 P. M. Eastern Standard Time on December 8, 1954. Reference is made to the Offer of Exchange for the full terms and conditions of such offer.

The Proposed Amendments to the Certificate of Incorporation

The proposed amendment to Article Fourth of the Certificate of Incorporation (Exhibit A to the Plan of Recapitalization annexed hereto), provides for the creation of 6,300,000 shares of Preferred Stock, the designations, preferences and special rights and the qualifications, limitations and restrictions of which are hereinafter summarized under the heading "Preferred Stock".

The proposed amendment to Article Eleventh of the Certificate of Incorporation (Exhibit 2 hereto), sets forth technical changes to said Article necessitated by the proposed amendment to Article Fourth. The portion of Article Eleventh changed by such amendment provides that the Corporation shall not, without the consent of the holders of a majority of the Common Stock, given in writing without a meeting or by resolution adopted at a meeting duly called for that purpose, issue any shares of Preferred Stock or, on or after November 15, 1954, any shares of Common Stock of the Corporation.

The vote of the holders of a majority of the shares of Common Stock issued and outstanding on the record date is required for approval of each of the proposed amendments.

Consent to the Issuance of Preferred Stock

The effect of the proposed Amendment to Article Eleventh of the Certificate of Incorporation, if adopted, would be to prohibit, without consent of the holders of a majority of the Common Stock given in writing without a meeting or by resolution adopted at a meeting duly called for that purpose, the issuance, on and after November 15, 1954, of further shares of Common Stock, and the issuance of any shares of Preferred Stock pursuant to the Plan of Recapitalization and Offer of Exchange and the issuance of shares of Preferred Stock in excess of the shares issued in exchange for Common Stock pursuant to the Offer of Exchange. If said amendment to Article Eleventh is adopted, there will be submitted to the meeting for adoption by the holders of a majority of the Common Stock issued and outstanding on the record date, a resolution authorizing, approving and consenting to the issuance of Preferred Stock pursuant to the Plan of Recapitalization in accordance with said amendment to Article Eleventh of the Certificate of Incorporation.

The management of the Corporation is advised that it is the present intention of Mission Development Company, Mission Corporation and Pacific Western Oil Corporation to vote in favor of each of the foregoing matters to be acted on at the meeting.

PREFERRED STOCK

General: The Preferred Stock is to be created by the proposed amendment to the Certificate of Incorporation. The statements herein concerning such Preferred Stock are an outline, do not purport to be complete, and are qualified in their entirety by reference to the proposed amendment to Article Fourth of the Certificate of Incorporation, Exhibit A to the Plan of Recapitalization (Exhibit 1 hereto).

Dividends: The Preferred Stock is entitled to quarterly cumulative dividends, when and as declared, at the rate of $1.20 per annum (and no more), payable in cash on the 10th day of January, April, July and October in each year, commencing January 10, 1955, out of funds legally available

for the payment of dividends in preference to any dividends or distributions on junior stock. No interest is payable on dividends in arrears.

Redemption: The Preferred Stock may be redeemed at the option of the Corporation at any time in whole or in part, upon at least thirty days' notice at the following redemption prices per share (the "optional redemption price"), plus accrued dividends thereon to the date fixed for redemption:

If redeemed on or before January 10, 1956, $30.00; if redeemed after January 10, 1956 but on or before January 10, 1957, $29.00; if redeemed after January 10, 1957 but on or before January 10, 1958, $28.00; if redeemed after January 10, 1958 but on or before January 10, 1959, $27.00; if redeemed after January 10, 1959 but on or before January 10, 1960, $26.00; if redeemed after January 10, 1960, $25.00.

In case of redemption of less than all of the outstanding Preferred Stock, such redemption shall be made, pro rata or the shares to be redeemed shall be chosen by lot, in such manner as the Board of Directors shall determine.

Sinking Fund: The Preferred Stock will be entitled to the benefits of a sinking fund subject to the restrictions referred to below under "Voting Rights and Restrictions on Certain Corporate Action". For so long as any shares of Preferred Stock shall be outstanding, on or before June 10 and December 10 in each year, commencing with June 10, 1960, the Corporation is to set apart, as a sinking fund, an amount in cash sufficient to redeem on the July 10 or January 10, whichever shall first occur, next ensuing, at the sinking fund redemption price of $25 per share, plus accrued dividends thereon to the date fixed for redemption, such number of whole shares of Preferred Stock, as shall equal, to the nearest fraction, 1¼% of the greatest number of shares of Preferred Stock theretofore at any time outstanding. On each such July 10 and January 10, the Corporation is to redeem such shares of Preferred Stock at the sinking fund redemption price in the manner as prescribed for optional redemption.

The Corporation may satisfy its sinking fund obligation in whole or in part by crediting against such obligation at the sinking fund redemption price, shares of Preferred Stock purchased prior to the date on which sinking fund payments are required to be set aside.

Liquidation Rights: Subject to the restrictions referred to below under "Voting Rights and Restrictions on Certain Corporate Action", in the event of any liquidation, dissolution or winding up of the Corporation, the holders of Preferred Stock are entitled to receive in cash, before any distribution of the Corporation's assets to the holders of any class of stock junior to the Preferred Stock, an amount equal to the optional redemption price of such Preferred Stock at the time of such liquidation, dissolution or winding up, plus accrued dividends to the date of payment and no more. The consolidation or merger of the Corporation with or into another corporation, or the sale, lease or conveyance of all or substantially all of the assets of the Corporation shall not be deemed a liquidation, dissolution or winding up of the Corporation.

Voting Rights and Restrictions on Certain Corporate Action: Holders of Preferred Stock do not vote except as required by law, and as follows:

1. If and when dividends on the Preferred Stock are in arrears in an aggregate amount at least equal to six quarterly dividends, the holders of such Preferred Stock will have the right, until all arrears of dividends, and the dividends for the current quarterly period shall have been paid or declared and provided for, to vote as a class to elect two members of the Board of Directors, provided that the respective term of office of each such director shall *ipso facto* cease and terminate when dividends on the Preferred Stock shall cease to be in arrears, and the dividends for the then current quarterly period shall have been paid or declared and provided for, and the vacancies created by such termination of office of each such director may be filled by a majority of the remaining directors in accordance with the By-Laws of the Corporation.

2. Without affirmative vote or written consent of at least two-thirds of the outstanding Preferred Stock, voting as a class, the Corporation may not:

(a) Authorize any additional class of stock ranking prior to the Preferred Stock; or

(b) Subject to the provisions summarized in paragraph 3 below, amend, alter or repeal any provision of the Certificate of Incorporation, as amended, or any other certificate filed pursuant to law which would adversely affect any special right or preference of the outstanding shares of Preferred Stock; or

(c) Authorize the voluntary dissolution, liquidation or winding up of the Corporation unless the holders of the Preferred Stock will receive on such dissolution, liquidation or winding up the cash equivalent of the optional redemption price at such time, plus accrued dividends thereon; or

(d) Subject to the provisions summarized in paragraph 3 below, merge or consolidate the Corporation with or into any other corporation, unless the surviving corporation will have no class of stock, ranking prior to the Preferred Stock or the stock, if any, issued to the holders of such Preferred Stock in connection with such merger or consolidation; or

(e) Give any guaranty, or similar obligation for the payment of any amounts by way of dividends on, or for the redemption or retirement of, the stock of any other corporation.

3. The vote and consent of the holders of the Preferred Stock shall not be required for:

(a) The merger or consolidation of the Corporation with or into, or the sale of all or substantially all of the assets of the Corporation to any other corporation, and the authorization and issuance in connection therewith by the corporation resulting from or surviving such merger or consolidation, or to which such assets are so sold, of shares of stock ranking on a parity with the Preferred Stock (or the stock, if any, issued to holders of Preferred Stock in lieu thereof in connection with such merger or consolidation or sale of assets), in lieu of or in exchange for stock of any corporation which is a party to such merger or consolidation, or which shall purchase such assets, or in exchange for property or assets, provided that the Board of Directors of the Corporation shall determine that the value per share of such stock of such corporation, or in the case of property or assets, the value thereof, shall be at least equal to the par value, if any, of the stock so issued in lieu thereof or in exchange therefor; or

(b) The authorization of additional shares of Preferred Stock ranking on a parity with the Preferred Stock and the issuance thereof for cash, or for property or assets, provided that the Board of Directors of the Corporation shall determine the value of such property or assets to be at least equal to the par value, if any, of the stock issued in exchange therefor; or

(c) The amendment of the Certificate of Incorporation so as to change the dividend rates, the payment dates, the redemption or liquidation prices per share or the sinking fund provisions with respect to shares of Preferred Stock which are authorized but unissued.

Miscellaneous: Holders of fully paid shares of Preferred Stock are not liable for further calls or assessments by the Corporation or otherwise. The Preferred Stock has no preemptive rights. Shares of Preferred Stock which have been redeemed or acquired by the Corporation, and credited against the sinking fund requirements, or retired pursuant to the provisions of the General Corporation Law of the State of Delaware may not be reissued or resold. Shares of Preferred Stock may be repurchased by the Corporation irrespective of the existence of arrears of dividends on such stock. So long as any of the Preferred Stock shall be outstanding, no dividends except dividends or distributions payable in shares junior to such Preferred Stock, shall be declared or paid on any junior stock, nor shall shares of such junior stock be purchased or redeemed by the Corporation, or sinking fund requirements be satisfied in respect of such junior stock, except from earned surplus accumulated after December 31, 1953, and unless (a) all dividends on the Preferred Stock are current and not in arrears, and (b) all sinking fund requirements in respect of the Preferred Stock are currently satisfied.

The consent of the holders of a majority of the Common Stock outstanding and entitled to vote, given in writing without a meeting or by resolution at a meeting duly called for that purpose, is

required for the issuance of any shares of Preferred Stock remaining authorized but unissued after the issuance of shares of Preferred Stock in exchange for shares of Common Stock pursuant to the Offer of Exchange, and, on or after November 15, 1954, for the issuance of any shares of Common Stock. Subject to such consent the Board of Directors may issue any authorized but unissued shares of Preferred Stock or any authorized but unissued shares of Common Stock in accordance with the laws of the State of Delaware.

Common Stock: Subject to the rights of the Preferred Stock, the Common Stock is entitled to dividends as and when declared by the Directors, is entitled upon liquidation to receive the net assets of the Corporation, and is vested with all voting rights, each share being entitled to one vote. The Common Stock has no preemptive, subscription, or conversion rights, and holders of fully paid shares thereof are not liable to calls or assessments by the Corporation.

THE REASONS FOR THE OFFER OF EXCHANGE

The Corporation has undertaken and is carrying on a comprehensive coordinated program of expansion and modernization calling for large expenditures and designed to increase its reserves of crude oil and natural gas, to add to and modernize its refining facilities and to improve its marketing position. On April 29, 1954, the stockholders were so advised and were also informed that the Board of Directors concluded it to be advisable to finance the expansion and modernization program largely out of current earnings, with the result that the amount of cash available for dividends will be greatly reduced. Accordingly, no cash dividends were declared for the second and third quarters of this year. A 5% stock dividend was distributed on June 23, 1954.

While most of the stockholders appear to be content to forego cash dividends in return for the possibility of greater earnings and values which should result from the capital expenditures necessitated by the program of expansion and modernization, some stockholders have expressed their desire to receive cash dividends in an amount no less than previously received. After considerable study of the matter the management of the Corporation evolved the Plan of Recapitalization whereby such of the stockholders who so desire, other than Mission Development Company, Mission Corporation and Pacific Western Oil Corporation which companies together own approximately 53% of the outstanding Common Stock, will be given the opportunity to exchange all or part of their Common Stock for a cumulative preferred stock which will carry a dividend at the rate of $1.20 annually.

Execution of the Plan of Recapitalization will permit those stockholders, who so desire, to receive cash dividends at a rate slightly higher than the highest dividends paid on the Common Stock in any year by exchanging their Common Stock for such Preferred Stock, and at the same time will permit those stockholders who place a greater value on future growth possibilities to retain their Common Stock with full knowledge that it is likely that no cash dividends will be paid thereon for a number of years or, if paid, that such dividends likely will be small in comparison with dividends paid in prior years. The Board of Directors has concluded this to be preferable to paying greatly reduced dividends to all stockholders. Those stockholders who desire both cash dividends and the opportunity to share in future growth may, of course, exchange only a portion of the stock held by them and retain a portion of their Common Stock.

EFFECT OF THE PROPOSED EXCHANGE ON THE COMMON STOCK

In the event that the proposed amendment to the Certificate of Incorporation is approved and shares of Common Stock are exchanged for shares of Preferred Stock, the rights of the holders of Common Stock will be diminished by the preferences, special rights and powers summarized above, granted to the Preferred Stock and except as so diminished, the rights of Common Stockholders who retain their stock will not be adversely affected. The possibility of the Common Stock receiving dividends will be reduced to the extent earnings are required for cumulative dividends and the sinking fund and redemption requirements. The cash requirements of the expansion and modernization program limit the ability to pay cash dividends on the Common Stock for a number

of years. In addition, to the extent that shares of Common Stock are exchanged, the Retained Profits Reinvested Account presently available for dividends on the Common Stock will be reduced. To the extent that the underlying asset value of the Common Stock may now, or hereafter, be in excess of $25 per share, and to the extent of the exchange effected, the proportionate equity of the Common Stockholders in the net assets and in the net earnings exceeding Preferred Stock dividend requirements of the Corporation and in the possible future enhancement thereof, will be increased. In accordance with oil industry practice, the balance sheets of the Corporation do not reflect fully the current value of oil and gas reserves of the Corporation. Such unreflected values, which are deemed substantial, after the payment of the dividends to the holders of the Preferred Stock and subject to the other preferences and special rights of the Preferred Stock, will inure to the benefit of the holders of the Common Stock who do not exchange their shares of Common Stock for shares of the Preferred Stock.

Assuming that all the 6,300,000 shares of Preferred Stock proposed to be authorized were to be issued in exchange for an equal number of shares of Common Stock, based on the earnings of the Corporation for the year ended December 31, 1953, the earnings per share, after such exchange, applicable to the shares of Common Stock retained by Mission Development Company, Mission Corporation and Pacific Western Oil Corporation, would have amounted to approximately $4.12 per share as compared with $2.75 per share prior to such exchange.

FEDERAL INCOME TAX RESULTS TO COMMON STOCKHOLDERS

The Corporation is advised by counsel that, pending issuance of Regulations under the Internal Revenue Code of 1954, it may not be possible to obtain from the Commissioner of Internal Revenue a specific ruling on the transaction, but that in the opinion of such counsel no gain or loss will be recognized to present holders of Common Stock for Federal Income Tax purposes under the Internal Revenue Code of 1954 by reason of the receipt of Preferred Stock in exchange for their Common Stock pursuant to the Plan of Recapitalization.

Exhibit 1
to
Proxy Statement

TIDE WATER ASSOCIATED OIL COMPANY

PLAN OF RECAPITALIZATION

Dated: October 7, 1954

1. Tide Water Associated Oil Company (hereinafter called the "Corporation"), a Delaware corporation, has an authorized capital stock consisting of 15,000,000 shares of common stock, $10.00 par value (hereinafter sometimes called "Common Stock") and 873,779 shares of preferred stock without par value (hereinafter sometimes called "Old Preferred Stock"). As of the date hereof, there are outstanding 13,433,299 shares of Common Stock and no shares of Old Preferred Stock. As of the date of the Plan the Common Stock Capital Account of the Corporation is $134,332,990, representing $10.00 for each share of Common Stock outstanding; and the Capital Surplus Account $6,927,745. As of June 30, 1954 the Retained Profits Reinvested Account of the Corporation was $186,592,119.

2. Of the outstanding Common Stock of the Corporation 5,180,938 shares are owned and held by Mission Development Company, 377,524 shares are owned and held by Mission Corporation, and 1,557,216 shares are owned and held by Pacific Western Oil Corporation. Mission Development Company, Mission Corporation and Pacific Western Oil Corporation together own 7,115,678 shares, constituting approximately 53% of the outstanding Common Stock.

3. It is proposed to amend the Certificate of Incorporation of the Corporation to create an aggregate of 6,300,000 shares of a new cumulative preferred stock, entitled to dividend payments at the rate of $1.20 annually, and having a par value of $25 each (hereinafter sometimes called "Preferred Stock") in lieu of the Old Preferred Stock.

4. The designations and the powers, preferences and rights, and the qualifications, limitations and restrictions of such Preferred Stock shall be as set forth in the proposed amended Article Fourth of the Certificate of Incorporation, a copy of which is annexed hereto as Exhibit A hereof.

5. An offer will be made to the holders of the outstanding Common Stock of the Corporation, other than Mission Development Company, Mission Corporation and Pacific Western Oil Corporation, by written Offer of Exchange, to issue to such holders of outstanding Common Stock, other than Mission Development Company, Mission Corporation and Pacific Western Oil Corporation, who elect to exchange all or any part of the Common Stock of the Corporation held by them, shares of such Preferred Stock in exchange for the surrender to the Corporation for cancellation of shares of Common Stock in the ratio of one share of Preferred Stock for each share of Common Stock surrendered, subject to the formal approval by the holders of a majority of the outstanding Common Stock of this Plan of Recapitalization and the amendment to Article Fourth of the Certificate of Incorporation proposed as hereinabove described and subject to said Amendment's becoming effective. Such offer shall be open until 3:30 p.m., Eastern Standard Time, December 8, 1954. Any holder of the Corporation's Common Stock, other than Mission Development Company, Mission Corporation and Pacific Western Oil Corporation, will be given the opportunity of accepting the exchange offer by depositing for exchange all or any number of shares of Common Stock held by him. Any such stockholder will be permitted to revoke his acceptance and direct return of the deposited shares by giving notice thereof, which shall be received prior to 3:30 p.m., Eastern Standard Time, December 8, 1954. No revocation will be permitted thereafter.

6. All shares of Common Stock exchanged for Preferred Stock will be cancelled and retired by the Corporation.

7. There will be set up on the books of the Corporation as a Preferred Stock Capital Account in respect of each share of Preferred Stock issued in exchange for Common Stock, the sum of $25.00 by transferring to such Preferred Stock Capital Account from Common Stock Capital Account in respect of each share of Common Stock received by the Corporation for exchange and surrendered for cancellation and retirement the sum of $10.00 presently set up upon the books as the capital in respect of each share of such Common Stock, and by transferring from the Retained Profits Reinvested Account to the Preferred Stock Capital Account in respect of each such share of Preferred Stock so issued the sum of $15.00 so that the Preferred Stock Capital Account shall equal $25.00 per each share of Preferred Stock so issued.

8. In the event that this Plan of Recapitalization and the proposed amendment to Article Fourth of the Certificate of Incorporation are not approved by the holders of a majority of the outstanding Common Stock at a special meeting of the stockholders to be called for such purpose, or upon any adjournment or adjournments thereof, or in the event that said proposed amendment to Article Fourth of the Certificate of Incorporation shall not become effective, this Plan of Recapitalization shall not become effective and shall be inoperative.

Exhibit A
to Plan of
Recapitalization

TIDE WATER ASSOCIATED OIL COMPANY

Proposed Amendment to Article Fourth
of the
Certificate of Incorporation

FOURTH: The total number of shares of all classes of stock which the corporation shall have authority to issue is 21,300,000, of which 6,300,000 shares shall be shares of $1.20 cumulative preferred stock of the par value of $25 each (hereinafter called Preferred Stock) and 15,000,000 shares shall be shares of common stock of the par value of $10 each (hereinafter called Common Stock).

A statement of the designations and the powers, preferences and rights, and the qualifications, limitations or restrictions thereof, of the shares of stock of each class which the corporation shall be authorized to issue, is as follows:

1. The holders of Preferred Stock shall be entitled to receive, and the corporation shall be bound to pay, only as and when declared by the Board of Directors and out of funds legally available for the payment of dividends, cumulative dividends, at the rate of $1.20 per annum from the date of the issuance of said shares, and no more, payable in cash, quarterly, on the 10th days of January, April, July and October in each year, commencing with the 10th day of January 1955, provided that, in the event that any such day shall be a Saturday, Sunday, or legal holiday, such quarterly payments shall be made on the next succeeding business day. If dividends on the Preferred Stock shall be in arrears, the holders thereof shall not be entitled to any interest thereon, or sum of money in lieu of interest.

2. Upon any dissolution, liquidation or winding up of the corporation, the holders of Preferred Stock shall be entitled, before any distribution or payment is made to the holders of any class of stock ranking junior to the Preferred Stock, to be paid in respect of each share of such Preferred Stock then issued and outstanding an amount in cash equivalent to the redemption price of such Preferred Stock as provided in Section 5 of this Article Fourth, at the time of such dissolution, liquidation or winding up, as hereinafter provided, plus accrued dividends thereon to the date of payment, and no more. In case the net assets of the corporation are insufficient to pay the holders of all outstanding shares of Preferred Stock the full amounts to which they are respectively entitled, the entire net assets of the corporation shall be distributed ratably to the holders of all outstanding shares of Preferred Stock in proportion to the amounts to which they are respectively entitled. The consolidation or merger of the corporation with or into another corporation, or the sale, lease or conveyance of all or substantially all of the assets of the corporation as an entirety shall not be deemed a dissolution, liquidation or winding up of the corporation for the purposes of this Section 2 of this Article Fourth.

3. Except as otherwise required by law and subject to the provisions of Section 4 of this Article Fourth, no holder of Preferred Stock shall have any right to vote for the election of directors or for any other purpose; provided, however, that, if and when dividends on the Preferred Stock shall be in arrears and such arrears shall aggregate an amount at least equal to six quarterly dividends upon the Preferred Stock, then and in such event, and until such rights shall cease as hereinafter provided, the holders of the Preferred Stock shall be entitled at all elections of directors, voting separately as a class, to elect two members of the Board of Directors, irrespective of the number of directors at any time constituting the Board. At any meeting at which the holders of Preferred Stock voting as a class, shall be entitled to elect directors, the holders of a majority of the then outstanding shares of Preferred Stock, present in person or by proxy, shall constitute a quorum for the purpose of electing the directors which the holders of Preferred Stock shall be entitled to elect. When-

ever all arrears of dividends on the Preferred Stock shall have been paid or declared and provided for, and dividends thereon for the current quarterly period shall have been paid or declared and provided for, then the right of the holders of the Preferred Stock to vote, as provided in this Section 3 of this Article Fourth, at all elections of directors shall cease, and the respective terms of office of any and all directors theretofore elected by the vote of the holders of the Preferred Stock, as hereinabove provided, shall ipso facto cease and terminate and vacancies shall be deemed to exist in respect thereof, but subject always to the same provisions for the vesting of such voting rights in the case of any such future arrearages of dividends. In any case in which the holders of the Preferred Stock shall be entitled to vote pursuant to the provisions of this Section 3 or of Section 4 of this Article Fourth or pursuant to law, each holder of Preferred Stock shall be entitled to one vote for each share thereof held.

4. (a) Except as hereinafter provided in this Section 4 of this Article Fourth, so long as any shares of Preferred Stock are outstanding, the consent of the holders of at least two-thirds (⅔) of the outstanding shares of Preferred Stock, given in person or by proxy, either in writing or at a meeting called for that purpose, at which the holders of the Preferred Stock shall vote separately as a class, shall be necessary for effecting or validating any one or more of the following:

(1) The authorization of any additional class of stock ranking prior to the Preferred Stock;

(2) The amendment, alteration or repeal of any of the provisions of the Certificate of Incorporation of the corporation or any amendment thereto or any other certificate filed pursuant to law which would adversely affect any of the preferences, special rights or powers of outstanding shares of Preferred Stock granted under this Article Fourth;

(3) The voluntary dissolution, liquidation or winding up of the corporation, unless upon such voluntary dissolution, liquidation or winding up the holders of the Preferred Stock will receive an amount in cash equivalent to the redemption price of such Preferred Stock at such time, as provided in Section 5 of this Article Fourth plus accrued dividends thereon to the date of payment;

(4) Subject to the provisions of subparagraph (b) of Section 4 of this Article Fourth, the merger or consolidation of the corporation with or into any other corporation, unless the corporation resulting from or surviving such merger or consolidation will have, after such merger or consolidation, no class of stock, either authorized or outstanding, ranking prior to the Preferred Stock (or the stock, if any, issued to holders of Preferred Stock in lieu thereof, in connection with such merger or consolidation);

(5) The giving by the corporation of any guaranty or similar obligation for the payment of any amounts by way of dividends on, or for the redemption or retirement of, the stock of any other corporation.

(b) Nothing in this Section 4 of this Article Fourth contained, however, shall be deemed to require such consent to

(1) The merger or consolidation of the corporation with or into, or the sale of all or substantially all of the assets of this corporation to, any other corporation and the authorization and issuance in connection therewith by the corporation resulting from or surviving such merger or consolidation, or to which such assets are so sold, of shares of stock ranking on a parity with the Preferred Stock (or the stock, if any, issued to holders of Preferred Stock in lieu thereof in connection with such merger or consolidation or sale of assets), in lieu of or in exchange for stock of any corporation which is a party to such merger or consolidation, or which shall purchase such assets, or in exchange for property or assets, provided that the Board of Directors of the corporation shall determine that the value per share of such stock of such corporation, or in the case of property or assets, the value thereof, shall be at least equal to the par value, if any, of the stock so issued in lieu thereof or in exchange therefor;

(2) The authorization of additional shares of Preferred Stock or of shares of stock of a class or classes ranking on a parity with the Preferred Stock and the issuance thereof for cash or for

property or assets, provided that, in the case of the issuance of any of such stock for property or assets, the Board of Directors of the corporation shall determine the value of such property or assets to be at least equal to the par value, if any, of the stock issued in exchange therefor;

(3) The amendment of the Certificate of Incorporation so as to change the dividend rates, the dividend payment dates, the redemption or liquidation prices per share or the sinking fund provisions with respect to shares of Preferred Stock which are authorized but unissued.

5. The corporation, at the option of the Board of Directors, may redeem at any time, or from time to time, any Preferred Stock at the following redemption prices per share plus accrued dividends thereon to the date fixed for redemption: if redeemed on or before January 10, 1956, $30.00; if redeemed after January 10, 1956 but on or before January 10, 1957, $29.00; if redeemed after January 10, 1957 but on or before January 10, 1958, $28.00; if redeemed after January 10, 1958 but on or before January 10, 1959, $27.00; if redeemed after January 10, 1959 but on or before January 10, 1960, $26.00; if redeemed after January 10, 1960, $25.00; provided, however, that, not less than thirty days previous to the date fixed for redemption, a notice of the time and place thereof shall be given to the holders of record of the shares of Preferred Stock so to be redeemed, by mailing a copy of such notice to such holders at their respective addresses as the same appear upon the books of the corporation. In case of redemption of less than all of the outstanding Preferred Stock, such redemption shall be made pro rata or the shares to be redeemed shall be chosen by lot, in such manner as the Board of Directors may determine.

At any time after notice of redemption has been given in the manner herein prescribed, or after the corporation shall have delivered to any bank or trust company having its principal office in the Borough of Manhattan, City and State of New York, an instrument in writing irrevocably authorizing such bank or trust company to give notice of redemption of all or any part of the outstanding Preferred Stock in the name of the corporation and in the manner herein prescribed, the corporation may deposit the amount of the aggregate redemption price, plus the amount of such accrued dividends, with any such bank or trust company named in such notice, in trust for the holders of the shares so to be redeemed, payable, on the date fixed for redemption as aforesaid and in the amounts aforesaid, to the respective order of such holders, upon endorsement to the corporation or otherwise as may be required and upon surrender of the certificates for such shares. Upon the deposit of the aggregate redemption price plus the amount of such accrued dividends as aforesaid, or if no such deposit is made, upon said date fixed for redemption (unless the corporation shall default in making payment of the redemption price plus such accrued dividends as set forth in said notice) such holders shall cease to be stockholders with respect to said shares and shall be entitled only to receive the redemption price plus such accrued dividends on the date fixed for redemption as aforesaid, from such bank or trust company or from the corporation, without interest thereon, upon endorsement, if required, and the surrender of the certificates for such shares, as aforesaid; provided that any funds so deposited by the corporation and unclaimed at the end of six years from the date fixed for such redemption shall be repaid to the corporation upon its request, after which repayment the holders of such shares so called for redemption shall look only to the corporation for payment of the redemption price thereof plus such accrued dividends. Any funds so deposited which shall not be required for such redemption shall be returned to the corporation forthwith. Any interest accrued on any funds so deposited shall belong to the corporation and shall be paid to it from time to time.

Subject to the provisions hereof, the Board of Directors shall be authorized to prescribe the manner in which Preferred Stock shall be redeemed from time to time. No shares of Preferred Stock which shall have been redeemed or which shall have been purchased by the application of capital or otherwise retired pursuant to the provisions of the General Corporation Law of the State of Delaware shall be reissued or resold.

6. In no event, so long as any of the Preferred Stock shall be outstanding, shall any dividend whatsoever, whether in cash, property or otherwise, except dividends or distributions payable in shares of stock of a class ranking junior to the Preferred Stock, be declared or paid, or any distribution be

made, on any stock of the corporation of a class ranking junior to the Preferred Stock, nor shall any shares of any such junior class of stock be purchased or redeemed by the corporation, nor shall any moneys be paid to or set aside or made available for a purchase fund or sinking fund for the purchase or redemption of any shares of any such junior class of stock, except from earned surplus of the corporation accumulated subsequent to December 31, 1953, and unless (a) all dividends on all the Preferred Stock then outstanding for all past dividend periods shall have been paid or declared and provided for and the full dividends for the then current quarterly dividend period shall have been paid or declared and provided for, and (b) the corporation shall have paid or set aside all amounts, if any, theretofore required to be paid or set aside as and for the sinking fund for the Preferred Stock for the then current semi-annual period, and all defaults, if any, in complying with the sinking fund requirements in respect of previous fiscal years shall have been made good.

7. So long as any shares of Preferred Stock shall be outstanding, the corporation shall, on or before June 10 and December 10 in each year, commencing with June 10, 1960, set apart in cash, as and for a sinking fund for the redemption of the Preferred Stock, such amount as will be required to redeem on the July 10 or January 10, whichever shall first occur, next ensuing, at the sinking fund redemption price of $25.00 per share, plus accrued dividends thereon to the date fixed for redemption, such number of whole shares of Preferred Stock as shall equal, to the nearest fraction, 1¼% of the greatest number of shares of Preferred Stock theretofore at any time outstanding, and shall, on each such January 10 and July 10, redeem such number of shares of Preferred Stock in the manner and with the effect provided in Section 5 of this Article Fourth, except that the redemption price shall be the sinking fund redemption price hereinabove in this Section 7 specified in lieu of the redemption price provided in said Section 5; provided, however, that in lieu of setting aside any such amount in cash, or any part thereof, and so redeeming any shares of Preferred Stock, the corporation, on or before the date on which any such amount is required to be so set aside pursuant to this Section 7 of this Article Fourth, may purchase and set aside for cancellation shares of Preferred Stock, in which event the number of shares of Preferred Stock required, pursuant to this Section 7 of this Article Fourth, to be so redeemed on the January 10 or July 10, as the case may be, next ensuing, shall be reduced by the number of shares of Preferred Stock so purchased and set aside, and the amount in cash so required to be set aside as and for a sinking fund for the Preferred Stock shall be reduced by an amount equivalent to the sinking fund redemption price, plus such accrued dividends, which would have been required to be so set aside in cash pursuant to this Section 7 of this Article Fourth in respect of such number of shares of Preferred Stock so purchased and set aside in the event that the same had not been so purchased and set aside.

8. The failure of the corporation to pay any dividend or arrearages of accumulated dividends on the Preferred Stock or to pay or set aside any amount required to be paid or set aside as and for a sinking fund for the Preferred Stock, or to redeem any Preferred Stock pursuant to the provisions of this Article Fourth, or to make good any default in complying with the sinking fund requirements shall not give rise to any rights in the holders of the Preferred Stock or impose upon the corporation any liabilities or disabilities, except as herein, in this Article Fourth, specifically provided.

9. No shares of Preferred Stock which shall have been redeemed through the operation of the sinking fund, or for which credit against the sinking fund requirements shall have been taken, shall be applied against any subsequent sinking fund requirement or reissued or resold.

10. Subject to the prior rights of the Preferred Stock and to the limitations set forth in Section 6 of this Article Fourth, dividends may be paid upon the Common Stock as and when declared by the Board of Directors out of funds legally available for the payment of dividends.

11. Upon any dissolution, liquidation or winding up of the corporation, whether voluntary or involuntary, after the holders of the Preferred Stock shall have been paid the full amounts to which

they are respectively entitled, the remaining net assets of the corporation shall be distributed ratably to the holders of Common Stock.

12. Except as otherwise expressly provided in Sections 3 and 4 of this Article Fourth, and except as otherwise may be required by law, the Common Stock shall have the exclusive right to vote for the election of directors and for all other purposes, each holder of Common Stock being entitled to one vote for each share thereof held.

13. For the purposes of this Article Fourth,

(a) The terms 'accrued dividends', 'dividends accrued', 'dividends in arrears' and similar terms shall mean, in respect of each share of Preferred Stock, an amount equal to thirty cents ($.30) for each quarterly dividend payment date which shall have elapsed from the date on which dividends on such share became cumulative, less the aggregate amount of dividends paid thereon;

(b) Any class or classes of stock of the corporation shall be deemed to rank

(1) Prior to the Preferred Stock, if the holders of such class or classes shall be entitled to the receipt of dividends or of amounts distributable on any dissolution, liquidation or winding up, as the case may be, in preference to or with priority over the holders of the Preferred Stock;

(2) On a parity with the Preferred Stock, whether or not the dividend rates, dividend payment dates or redemption or liquidation prices per share thereof be different from the Preferred Stock, if the rights of the holders of such class or classes to the receipt of dividends or of amounts distributable upon any dissolution, liquidation or winding up, as the case may be, shall be neither in preference to or with priority over, nor subject or subordinate to the rights of the holders of the Preferred Stock in respect of the receipt of dividends or of amounts distributable upon any dissolution, liquidation or winding up, as the case may be; and

(3) Junior to the Preferred Stock, if the rights of the holders of such class or classes shall be subject or subordinate to the rights of the holders of the Preferred Stock in respect of the receipt of dividends or of amounts distributable upon any dissolution, liquidation or winding up, as the case may be.

14. No stockholder of the corporation shall have any preemptive or preferential right of subscription to any shares of any class of stock of the corporation, whether now or hereafter authorized, or to any obligations convertible into stock of the corporation, issued or sold, nor any right of subscription to any thereof other than such, if any, and at such price as the Board of Directors, in its discretion from time to time may determine, pursuant to the authority hereby conferred by the Certificate of Incorporation, and the Board of Directors may issue stock of the corporation or obligations convertible into stock without offering such issue of stock either in whole or in part to the stockholders of the corporation, and no holder of Preferred Stock of the corporation shall have any preemptive or preferential right to receive any of such shares or obligations declared by way of dividend. Should the Board of Directors as to any portion of the stock of the corporation, whether now or hereafter authorized, or to any obligations, convertible into stock of the corporation, offer the same to the stockholders or any class thereof, such offer shall not in any way constitute a waiver or release of the right of the Board of Directors subsequently to dispose of other portions of said stock without so offering the same to the stockholders. The acceptance of stock in the corporation shall be a waiver of any such preemptive or preferential right which in the absence of this provision might otherwise be asserted by stockholders of the corporation or any of them.

15. Except as herein otherwise provided, any unissued shares of stock of any class, herein authorized or hereafter increased or created, may be issued from time to time by the corporation in such

manner, amounts and proportions and for such consideration as shall be determined from time to time by the Board of Directors and as may be permitted by law; and all issued shares of the capital stock of the corporation shall be deemed fully paid and non-assessable and the holders of such shares shall not be liable thereunder to the corporation or its creditors.

16. With the affirmative vote or written consent of the holders of at least a majority of the Common Stock of the corporation then issued and outstanding, the Board of Directors may at any time or from time to time authorize or approve a stock purchase plan or plans providing for the issue and sale to any or all of the employees, including officers, of the corporation or of any company in which the corporation owns a majority of the issued voting stock, of any shares of Common Stock of the corporation at such price and on such other terms and conditions as the Board of Directors shall determine and as may be permitted by law; provided, however, that any shares of Common Stock of the corporation subscribed for prior to October 15, 1936, under and pursuant to any stock purchase plan or plans authorized or approved by the Board of Directors prior to said date, may be issued and sold, without the necessity of such vote or written consent, in accordance with the provisions of such stock purchase plan or plans.

17. The corporation shall be entitled to treat the person in whose name any share is registered as the owner thereof, for all purposes, and shall not be bound to recognize any equitable or other claim to, or interest in, such share on the part of any other person, whether or not the corporation shall have notice thereof, save as expressly provided by the laws of the State of Delaware.

[fol. 174a]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 51—October Term, 1960

Argued November 1, 1960

Docket No. 25846

ISADORE BLAU, a stockholder of Tide Water Associated Oil Company, suing on behalf of himself and all other stockholders similarly situated and on behalf of and in the right of Tide Water Associated Oil Company, Plaintiff-Appellant-Appellee,

ROBERT LEHMAN, ALLAN S. LEHMAN, JOHN HERTZ, JOHN M. HANCOCK, MONROE C. GUTMAN, PAUL M. MAZUR, WILLIAM J. HAMMERSLOUGH, FRANCIS A. CALLERY, FREDERICK L. EHRMAN, JOHN R. FELL, WILLIAM S. GLAZIER, PHILIP H. ISLES, HERMAN H. KAHN, EDWIN L. KENNEDY, FRANK J. MANHEIM, PAUL E. MANHEIM, MORRIS NATELSON, HAROLD J. SZOLD and JOSEPH A. THOMAS, a co-partnership, doing business under the firm name and style of LEHMAN BROTHERS, Defendants-Appellees,

JOSEPH A. THOMAS, Defendant-Appellee-Appellant,

and

TIDE WATER ASSOCIATED OIL COMPANY, Defendant-Appellee.

[fol. 175a] Before: Swan, Clark and Medina, Circuit Judges.

Cross-appeals from a judgment of the United States District Court for the Southern District of New York. Archie O. Dawson, Judge.

In an action by a stockholder of Tide Water Associated Oil Company for recovery of short swing profits against

Joseph A. Thomas, a director, and against Lehman Brothers, a partnership composed of Joseph A. Thomas and others, based upon Section 16(b) of the Securities Exchange Act of 1934, the complaint was dismissed as against Lehman Brothers and a recovery allowed against Joseph A. Thomas for $3,893.41, the share of the firm profits from the purchase and sale of Tide Water Associated Oil Company stock found to have been "realized," although "waived" and not received by Thomas, but without interest. Cross-appeals by plaintiff and by Joseph A. Thomas. Opinion below reported in 173 F. Supp. 590. Affirmed.

Morris J. Levy, New York, N. Y., for plaintiff-appellant-appellee.

Cyrus R. Vance, New York, N. Y. (Robert S. Carlson and Simpson Thacher & Bartlett, New York, N. Y., on the brief), for defendants-appellees (other than Tide Water Associated Oil Company) and Joseph A. Thomas, defendant-appellee-appellant.

OPINION—December 20, 1960

MEDINA, *Circuit Judge*:

In this action by a stockholder of Tide Water Associated Oil Company brought under Section 16(b) of the Securities [fol. 176a] Exchange Act of 1934, 15 U. S. C. Section 78p (b),[1] to recover on Tide Water's behalf short swing profits

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[1] §16(b), 15 U. S. C. §78p(b) reads as follows:

"For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period

alleged to have been realized by Joseph A. Thomas, a director of Tide Water, and by Lehman Brothers, a partnership of investment bankers and stockbrokers, of which Thomas was a member, the complaint was dismissed as against all the partners other than Thomas, after a trial by the court without a jury, and judgment was entered against him for only $3,893.41 and costs. The trial judge computed the profits of Lehman Brothers at $98,686.77 but refused to direct judgment against Thomas for more than the amount which was, despite his claim that he had received no part of the profits, found to have been "realized by him." The method of computing the profits was also matter of dispute between the parties. Plaintiff and Thomas have filed cross-appeals. The opinion below is reported in 173 F. Supp. 590. [fol. 177a] On August 5, 1954 Thomas, then a partner of Lehman Brothers, became a director of Tide Water. Although he succeeded John Hertz, also a partner of Lehman Brothers, Judge Dawson, after a careful and comprehensive review of the testimony, found that "the invitation to join the Tide Water Board was upon the initiative of Tide Water." He also found "there was no evidence that the firm of Lehman Brothers deputed Thomas to represent its interests as director on the board of Tide Water."

On September 17, 1954 public announcement was made in the Wall Street Journal that Tide Water was considering a proposal to allow shareholders to exchange common stock for a new dividend-paying preferred stock; and on October 8, 1954 it was announced in the Wall Street Journal that

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exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection."

such a proposal had been approved by the directors. Immediately after this last announcement and on the same day Lehman Brothers, "acting solely on the basis of Tide Water's public announcements and without consulting Thomas with reference thereto," decided to purchase 50,000 shares of Tide Water common stock for the purpose of converting them into the new preferred stock and selling the preferred stock to institutional investors. Thomas had provided no confidential information whatever; and he did not even know the transaction concerning the 50,000 shares of Tide Water stock was under consideration by the Portfolio Committee of Lehman Brothers until the sales slips appeared upon his desk, after the first few thousand shares had been purchased. In response to his inquiry about this he was told that 50,000 shares of Tide Water common were to be bought, converted into preferred and sold. Immediately thereafter Thomas instructed the firm controller "to exclude me from any risk of the purchase or any profit or loss from the subsequent sale and to take the necessary steps to carry out my instructions." At a meeting of the partners the following Monday he told the other partners [fol. 178a] that he wanted them to know that he was "not a part of this Tide Water transaction at all," and they agreed. He later filed SEC Form 4 from time to time setting forth all the facts required to be reported, explaining that these were "transactions and holdings of Lehman Brothers a partnership of which I am a member. I have previously waived all interests in a total of 50,000 of these shares."

Between October 8, 1954 and November 15, 1954 Lehman Brothers purchased the 50,000 shares of Tide Water common stock for $1,330,800. Pursuant to the contemplated plan of recapitalization, Lehman Brothers on December 8, 1954 exchanged its 50,000 shares of common stock for 50,000 shares of a new preferred stock issued by Tide Water. Between December 9, 1954 and March 8, 1955 Lehman Brothers sold its 50,000 shares of preferred stock for $1,361,186.77. Out of the profits on this series of transactions within a period of six months Thomas received nothing, as his share of the partnership profits was calculated in accordance with his instructions to the firm con-

troller and his oral agreement with his partners to the effect that he was to be cut out of the Tide Water venture.

The Claim Against Lehman Brothers

Plaintiff argues that judgment for the full amount of $98,686.77 should have been rendered against Lehman Brothers. On this phase of the case the contentions of the parties revolve about the decision of this Court in *Rattner* v. *Lehman*, 2 Cir., 1952, 193 F. 2d 564. While plaintiff does not state in so many words that he asks us to reconsider our rulings in that case, such is the purport of much that is argued in plaintiff's briefs, and I shall assume that the contention is: (1) that the decision in *Rattner* is unsound and the case should be overruled; and (2) that this case is distinguishable on the facts from *Rattner*.

[fol. 179a] In that case John D. Hertz, a partner of Lehman Brothers, was a director of Consolidated Vultee Aircraft Corporation. The firm had made short swing profits on the purchase and sale of Consolidated Vultee common stock. Of these profits Hertz received $806.62 which he turned over to Consolidated Vultee. We refused to hold Lehman Brothers liable for the profits realized by the firm on the ground that Section 16(b) "contains no provision requiring the partners of a director to account for profits realized by them." In answer to the argument that this leaves a loophole in the law Judge Swan, writing for the court, observed that the omission of any provision for such liability "was intentional," as the legislative history of Section 16(b) indicated that a clause in the earlier drafts imposing such liability had been "eliminated from the statute as finally enacted." I feel bound by this ruling, especially since it has been in force for some eight years and the Congress has not seen fit to amend the statute; and Judge Swan and I vote to affirm the judgment in favor of Lehman Brothers on the authority of *Rattner*.

The alleged distinction between this case and *Rattner* on the question of the liability of the partnership is based upon a dictum by Judge Learned Hand in his concurring opinion in *Rattner*, to the effect that he agreed that Section 16(b) did not apply, "but I wish to say nothing as to whether, if

a firm deputed a partner to represent its interests as a director on the board, the other partners would not be liable." Plaintiff in the case before us argues that there is ample proof that director Thomas was deputed by Lehman Brothers to represent its interests as a director on the board of Tide Water; but the trial judge states that he finds no such evidence in the case.

To begin with, Judge Swan and I do not agree with this dictum, as we must take Section 16(b) as we find it, and we do not see how any sort of deputizing can make the part-[fol. 180a] ners or the partnership a "director" within the meaning of Section 16(b). But we do not have to decide the question, because the evidence in this case will not support an inference that Lehman Brothers deputized Thomas to represent its interests as director on the board of Tide Water. Doubtless the firm was pleased to have Thomas succeed Hertz as a director, and so was John Schiff, of Kuhn, Loeb & Company, who introduced his friend Thomas to David T. Staples, president of Tide Water who thereafter invited Thomas to become a director. However, there is no evidence of any deputizing or other affirmative action by the firm to cause Thomas to be made a director to protect the interests of the firm or to become its representative.

Reference is made in plaintiff's brief to certain general statements in the findings contained in the opinion in *United States* v. *Morgan, et al.*, D. C. S. D. N. Y., 1953, 118 F. Supp. 621. These must be understood against the background of the entire history of the investment banking business in the United States that was in one way or another involved in the comprehensive and exceedingly complicated charges of conspiracy to violate the Anti-trust laws. Thus, in reference to a time prior to World War I, when there was a sort of informal working arrangement between Goldman, Sachs & Co. and Lehman Brothers, the opinion states (p. 639):

> "With this background, it is easy to see that many of the issuers, especially those whose securities were not well known to the public, leaned heavily upon the sponsorship of the investment banking firms under whose auspices the securities were sold. Issuers invited partners or officers of investment banking firms to serve

on their boards of directors, in order to interest investors in their securities. Some of the prospectuses, which in those early days were little more than notices, stated that a partner or officer of a particular invest- [fol. 181a] ment banking firm would go on the board of directors of the issuer whose securities were being offered to the public for sale. Investment bankers sometimes asked to be put on the boards of directors of issuers in order to know how they were managed and to protect the interests of the investors to whom they had sold the issuer's securities. Since the investment bankers sponsored the securities and lent their names to their sale, they felt a certain obligation to the investors to whom they sold the securities to see to it that the issuers did not adopt any policies or engage in any practices which would impair the value of those securities. This was especially important in connection with foreign investors."

But general statements are of little assistance in the decision of particular issues. The fact that Thomas succeeded Hertz as a director of Tide Water, and the circumstance that there were other instances where one partner of Lehman Brothers succeeded another as a director in companies other than Tide Water, in the face of the credible and uncontradicted specific proof of the conversations that led up to the invitation by Staples to Thomas to become a director of Tide Water, are of no probative force whatever. Moreover, I do not think *Lehman, et al.* v. *Civil Aeronautics Board,* D. C. Cir., 1953, 209 F. 2d 289, cert. denied, 1954, 347 U. S. 916, has any bearing on the case before us.

For the above stated reasons Judge Swan and I find nothing here to distinguish this case from *Rattner,* which requires an affirmance of the judgment dismissing the case as against Lehman Brothers.

The Claim Against Joseph A. Thomas

Insofar as plaintiff seeks a judgment against Thomas for the full amount of the profits realized by Lehman Brothers [fol. 182a] on the Tide Water venture, this was one of the

points decided in *Rattner* and Judge Swan and I are content to follow that ruling. Here again, however, plaintiff claims the present case is distinguishable from *Rattner*. He relies upon a statement in the opinion of Judge Swan that both sides had assumed the stock purchases and sales were made without the knowledge of Hertz, and (193 F. 2d at 565) "Whether the result might be different had he caused the firm to make them, we need not now determine." Plaintiff in the case now before us insists that the proofs clearly demonstrate that director Thomas did cause Lehman Brothers to enter into the Tide Water stock venture, despite the findings of the trial judge to the contrary. We see no basis whatever for a decision by us that this finding of the trial judge is clearly erroneous. Indeed, it is the only finding permissible, as the trial judge believed the testimony adduced by Lehman Brothers to prove that director Thomas had revealed no confidential information whatever, and that he not only did not induce the firm to enter the venture, he had no knowledge that the matter was even under consideration. True he did say to some of his partners and to others as well that he liked the management of Tide Water and thought its general objectives were first-rate, but this is a far cry from the giving of confidential information concerning the forthcoming proposal for recapitalization by the exchange of common stock for a new dividend-paying preferred stock or otherwise causing or inducing the firm to purchase the stock. So, we must reach the same conclusion we did in *Rattner*: whether the result might be different had Thomas caused the firm to enter the Tide Water venture we need not now determine.

Judge Dawson held Thomas for the amount of the profits he would have received had he not attempted to disassociate himself from the 50,000 share transaction and waive his share of the profits. I agree with Judge Dawson that the [fol. 183a] profits for which he has been held accountable were, in contemplation of law, "realized by him."

This phase of the case presents an interesting and important question of novel impression that was left open in *Rattner* as Hertz did not resort to any waiver and disclaimer, as did Thomas in the case before us, and he had already voluntarily paid over to the corporation the $806.62

received by him as his share of the short swing profits of Lehman Brothers on the purchase and sale of Consolidated Vultee stock. This is not a question of New York partnership law, nor a question of Income Tax law, but rather and solely, as I see it, a question of the interpretation we are to give to a federal statute, Section 16(b).

I hold that when a partnership, one of the partners of which is a director of a corporation, makes short swing profits in speculative buying and selling of the stock of that corporation, the director must be said to have realized the share of the profits to which he would be entitled, irrespective of any waiver or disclaimer by him. Whether or not he actually receives his share of these profits is immaterial; he has "realized" profits and must account for them.

There is only one way to prevent stock manipulation by insiders to whom confidential information is available, and that is to squeeze every possible penny of profit out of such transactions. This has been held to be the clear purpose of Section 16(b), a "broadly remedial statute." *Smolowe* v. *Delendo Corp.*, 2 Cir., 136 F. 2d 231, 239, cert. denied, 1943, 320 U. S. 751. One way to do this was to construe Section 16(b) to include the partnership because of the unity of the partnership relationship and the fact that one of the partners is a director. But *Rattner* decided otherwise, and that is water over the dam as far as I am concerned. If we now hold that the director himself can escape by the mere device of a waiver and disclaimer, we [fol. 184a] shall have opened a breach in the law through which stockbrokers and investment banking houses, those most likely to be in a position to profit by the use of confidential information in stock speculation, can pass with impunity.

While no confidential information was improperly used in this case, we must bear in mind that the statute is designed to affect cases where confidential information might be used. Moreover, to permit a waiver and disclaimer to immunize the director would almost certainly lead to wholesale waivers and disclaimers by the various partners who are directors of corporations, with the result that the

profits waived by one partner would increase the profits of the others and in the end each would have about the same amount of profits he would have received from such transactions had there been no waiver and disclaimer. When the Congress passed Section 16(b) it was never intended to permit any such merry-go-round as this.[2]

The Method of Computing the "Profits Realized by" Thomas

The 50,000 shares of common stock of Tide Water were purchased by Lehman Brothers between October 8, 1954 and November 15, 1954; they were converted into the new preferred stock on December 8, 1954; and the 50,000 shares of new preferred stock were sold between December 9, 1954 and March 8, 1955. Thus all of these transactions occurred within the short swing period of six months specified in [fol. 185a] Section 16(b). If the conversion into the preferred stock constituted a "purchase" under Section 16(b) the profits amounted to $98,686.77, and the amount of these profits "realized" by Thomas was $3,893.41, as held by Judge Dawson. But Thomas contends that the conversion was not a "purchase" and that the profit must be computed by subtracting the cost of the shares of common stock from the amount received on the sale of the preferred stock, or $30,386.71.

We are not, however, computing profits in accordance with what might be the custom of traders and speculators in the stock market. We are construing a federal statute designed to prevent certain persons, including directors and officers, from making short swing profits by "the unfair use of information" available to them because of their

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[2] There is some evidence of this here. During cross examination the defendant Thomas was asked:

"Q. Is it customary for a partner who is a director in a corporation to waive his interests in the short swing profits realized by a corporation?"

He answered:

"A. I think customary is a pretty strong word. But all of us are aware of the existence of 16(b) and you certainly wouldn't want to find yourself in that predicament."

confidential relationship to the corporation. The cases present the problem of what is a "purchase" in a great variety of factual combinations. But the underlying principle, as I understand it, is that the transaction is a "purchase" if in any way it lends itself to the accomplishment of what the statute is designed to prevent. The leading case is *Park & Tilford, Inc.* v. *Schulte*, 2 Cir., 160 F. 2d 984, cert. denied, 1947, 332 U. S. 761. While we held the transaction not to be a "purchase" in *Roberts* v. *Eaton*, 2 Cir., 1954, 212 F. 2d 82, the same line of reasoning was used.[3] What was done in that case did not lend itself to the furtherance of the prohibited purpose. There is no rule of thumb; nor would it be wise to attempt to formulate such a rule.

[fol. 186a] Here the acquisition of the preferred stock was in all respects voluntary; Lehman Brothers had the choice of retaining its common stock or exchanging it for preferred stock. The stock of Tide Water was registered on the New York Stock Exchange and was widely held by the public. When the common was acquired the success of the Lehman Brothers Tide Water venture still depended on future shareholder approval. It was only after approval, the issuance of the preferred stock and the exchange that the profits were realized. The exchange constituted a necessary step to the consummation of the plan. We cannot say that such a situation did not lend itself to manipulation and to the making of short swing profits within the meaning of Section 16(b). We hold the exchange was a "purchase" and that the profits realized were properly computed by Judge Dawson.

Interest

Judge Dawson refused to allow interest on the recovery against director Thomas. It is well settled that the allowance of interest in Section 16(b) cases is not manda-

[3] See also *Ferraiolo* v. *Newman*, 6 Cir., 1958, 259 F. 2d 342, 345, cert. denied, 1959, 359 U. S. 927; *Blau* v. *Mission Corp.*, 2 Cir., 1954, 212 F. 2d 77; *Shaw* v. *Dreyfus*, 2 Cir., 172 F. 2d 140, cert. denied, 1949, 337 U. S. 907; *Blau* v. *Lamb*, D. C. S. D. N. Y., 1958, 163 F. Supp. 528, 534; *Blau* v. *Hodgkinson*, D. C. S. D. N. Y., 1951, 100 F. Supp. 361; *Truncale* v. *Blumberg*, D. C. S. D. N. Y., 1948, 80 F. Supp. 387.

tory. *Magida* v. *Continental Can Co.*, 2 Cir., 1956, 231 F. 2d 843. Judge Swan and I do not believe it was an abuse of judicial discretion to refuse such an allowance of interest in this case.

Affirmed.

SWAN, *Circuit Judge* (dissenting in part):

I agree with my brother Medina to affirm the judgment insofar as it dismissed the action as against the partners, other than Thomas, of Lehman Brothers. With respect to Thomas, I think he should be held liable in an amount less than the judgment against him awarded Tide-water.
[fol. 187a] In my opinion we should differentiate between the shares of Tide-water stock purchased *before* and those purchased *after* Thomas, with his partners' consent, withdrew from any participation in the partnership purchases of such stock. As to profits attributable to the shares purchased before Thomas' withdrawal, I think it reasonable to hold that Thomas could not relieve himself from liability by transferring to the other partners his share of such profits and, consequently, he can be held to have "realized" such profits within the meaning of the statute. But this argument is inapplicable to the shares purchased after Thomas withdrew. It is my understanding that a partnership agreement can be modified by parol so as to exclude one partner from participating in investments or sharing in the profits or losses on investments made subsequent to the modification. As to profits attributable to the *after*-purchased shares, Thomas had no interest to transfer to Lehman Brothers and I do not see how he can be held to have "realized" any profit on such shares. Consequently I think on Thomas' appeal the cause should be remanded for determination of the correct amount of the judgment to be awarded against him. As to the method of computing the profits and the non-allowance of interest I agree with my brother Medina.

CLARK, *Circuit Judge* (dissenting):

Against the background of "a widely condemned evil," §16(b) of the Securities Exchange Act of 1934 put teeth into the concept of a corporate director's fiduciary obligation by the simple but arbitrary course of requiring him to disgorge to his corporation "insider" profits from stock speculation obtained under stated circumstances and without regard to his own good faith or innocence. This device has worked successfully where more refined methods might [fol. 188a] have failed; and although the provision "is probably the most cordially disliked provision in all these statutes from the point of view of those whom it affects," Loss, Securities Regulation 578 (1951), yet its policy is so important and so generally approved that repeal seems unlikely, *id.* 579; Cook & Feldman, *Insider Trading under the Securities Exchange Act*, 66 Harv. L. Rev. 385, 612, 641 (1953). In our first case construing it we said, "The statute is broadly remedial," and went on to say: "We must suppose that the statute was intended to be thoroughgoing, to squeeze all possible profits out of stock transactions, and thus to establish a standard so high as to prevent any conflict between the selfish interest of a fiduciary officer, director, or stockholder and the faithful performance of his duty." *Smolowe* v. *Delendo Corp.*, 2 Cir., 136 F. 2d 231, 239, 148 A. L. R. 300, certiorari denied *Delendo Corp.* v. *Smolowe*, 320 U. S. 751. That principle has since shaped our statutory interpretation as well as that of other courts and is restated in our latest and full opinion in *Adler* v. *Klawans*, 2 Cir., 267 F. 2d 840.

To this uniform interpretation there appears to have been one notable exception, the decision relied on as authoritative here, *Rattner* v. *Lehman*, 2 Cir., 193 F. 2d 564. That case held that where a director was fortunate enough to be a partner in a brokerage firm which did the actual trading, he and his partners were relieved of liability for insiders' profits perhaps in all cases, but in any event in nearly all. The decision below, affirmed by my brother Medina, goes far to complete the process of complete immunity toward which my brother Swan, with relentless logic, tends. I think the principle is anomalous in granting

exemption in the very cases where the incentive to take insiders' profits is strongest as a part of a trading firm's normal business and where exception is the most difficult to understand. So I believe we should review the ruling [fol. 189a] in the light of experience and the present-day situation. And at the very least we should request assistance in the form of a brief *amicus curiae* from the S. E. C., which has often been most helpful on mooted issues in the past, but which has here not allayed, but has rather added to, the confusion, as I point out hereinafter.

I suggest that re-examination of the *Rattner* precedent is indicated for several reasons: the circumscribed nature of the discussion there had; the teaching of later experience; the equivocal position of the S. E. C.—now apparently clarified contra to the decision; and the confusion as to its possible scope and real or apparent exceptions. My own conclusion is that the case should be overruled or at least limited and that the partners here, including Thomas, should be required to pay Thomas' company the profits they made from short-swing trading in its stock.

The *Rattner* decision appears to be supported on three grounds, two of them stated in the opinion and a third adduced by later commentators. First reliance is placed upon a "literal reading" of the statute. But any reading, literal or otherwise, can hardly avoid the legal meaning of "owner" or eliminate the basic principles of partnership. Under these principles, clearly stated in New York law as embodied in the Uniform Partnership Act, property bought with partnership funds is partnership property, and a partner is co-owner with his partners of specific partnership property holding as a tenant in partnership with an equal right with his partners to possession of specific partnership property and with an equal share in the profits and surplus. N. Y. Partnership Law §§12, 40, 43, 50-52. Moreover, the partnership is charged with knowledge of or notice to a partner. *Id.* §23. I submit that on a literal *legal* reading of the statute, Thomas was co-owner with all the other partners of the TideWater stock when bought and of the profits when sold, and that Thomas stood at all [fol. 190a] times legally charged with full knowledge of what was going on in his firm, just as the other partners

had like knowledge. Further, I do not doubt that in any ordinary well run partnership, the practical facts of life actually coincide with these legal facts, and that one partner either actually knows what is going on in his group or is content to leave action to his colleagues. In any event, the legal situation seems clear—so much so that in my view co-owners cannot be excluded from the operation of the statute without a serious distortion of its terms. Furthermore to close the gap now opened up would require rather awkward and seemingly superfluous phraseology, such as that "owner" actually does include "co-owner."

A second ground of support for the decision was deduced from the legislative history and from the fact that a provision in earlier drafts which had made liable any person who acted on confidential information disclosed by a director was eliminated from the statute as finally enacted. But as the S. E. C. pointed out in its brief *amicus curiae* in *Rattner*, this history, so far as pertinent, really points the other way and in favor of an automatic application of the statute without the necessity of proving the parties' intent. That, too, is the view of the legislative history we emphasized in *Smolowe* v. *Delendo Corp., supra*, 2 Cir., 136 F. 2d 231, 235, 236. But the *Rattner* decision forces for this important class of cases the very step which we felt Congress had avoided, namely, a "subjective standard of proof, requiring a showing of an actual unfair use of inside information." 2 Cir., 136 F. 2d 231, 236.

The third ground of support, adduced by some commentators, 25 So. Calif. L. Rev. 475, 478 (1952), 100 U. of Pa. L. Rev. 463, 465 (1951),[1] is the harshness in result of [fol. 191a] the contrary conclusion. Passing the question whether Congressional intent is to be thus limited, one may question whether this is not an attack on the entire statutory policy which is somewhat misdirected when leveled only at a single consequence as here. Admittedly the statute operates stringently, with burdensome results to individ-

[1] Other comments on the decision appear in Loss, Securities Regulation 585 (1955 Supp.), and Cook & Feldman, *Insider Trading under the Securities Exchange Act*, 66 Harv. L. Rev. 385, 391. 403, 633-634 (1953).

uals, in many, possibly most, cases. But that seems not a sound reason for excepting its operation in this important and natural field of operation. True, the amounts involved may be large, as is to be expected from the high financial character of the protagonists naturally involved in the trading by Wall Street investment firms. But that may be easily taken as an argument for application of the statute here.[2] I think the exemption of these firms would be hard to explain to the ordinary small-scale director not so exempt and indeed to the investing public generally.

But if the requirement of a subjective standard of proof is to stand, then the question at once arises as to how much. And here the *Rattner* case did at least suggest the possibility of some limitation. The majority expressly declined to consider whether the result might be different had the partner "caused" the firm to make the short-swing transactions. Judge L. Hand in an obviously worried concurrence went further and, assuming for his disposition of the case that the firm had bought and sold the shares without any advice or concurrence by the director-partner, intimated that the result might be different if a firm deputed a partner to represent its interests as a director [fol. 192a] on the board. Here the evidence of director-participation is rather sharper than Judge Medina intimates and goes so far that it is hard to see what more the director could have done to assist his partners short of doing the trading himself. For in his deposition Thomas stated that he had suggested to his partners "from time to time that I thought TideWater under the new management was an attractive investment" and again, "When the new management came in, my opinion was asked of what I thought of it, and after I watched them in, I expressed my

[2] Enforcement of strict accounting and refund against corporate fiduciaries is not exactly a novel legal idea. See *Gratz* v. *Claughton*, 2 Cir., 187 F. 2d 48, 49, certiorari denied 341 U. S. 920; *Berner* v. *Equitable Office Bldg. Corp.*, 2 Cir., 175 F. 2d 218; *Nichols* v. *S. E. C.*, 2 Cir., 211 F. 2d 412, 417-418; *Surface Transit, Inc.* v. *Saxe, Bacon & O'Shea*, 2 Cir., 266 F. 2d 862, 868; *In re Midland United Co.*, 3 Cir., 159 F. 2d 340; *Woods* v. *City Nat. Bank & Trust Co. of Chicago*, 312 U. S. 262, 268; Loss, Securities Regulation 594 (1955 Supp.).

opinion freely that I thought the management was first-rate, that the company would do well under that management." He also said that one of the partners with whom he discussed the TideWater management after he became a director was Mr. Hammerslough, the trading partner who actually directed the firm's purchases of TideWater stock; and Hammerslough himself testified on deposition that after Thomas became a director he "spoke very highly of the management and prospects of the TideWater Oil Company. I believe he thought very highly of it." Unless judges are to be incredibly naive as to the facts of financial life, it is difficult to see what Thomas needed to say more to show that the lily was already gilded. The facts as to the proposed TideWater exchange were published in the Wall Street Journal so that further details as to that would have been quite superfluous. In fact I regard all this discussion whether or not the firm "deputed" its members to sit on many corporate boards as naive. Obviously this was an arrangement of mutual benefit to both sides; what difference can it make in realities which extended the first invitation? And what further official "deputation" is needed more than the mere fact of this mutually beneficial management? So unless *Rattner* is to afford exemption in almost all situations of financial importance, we must re-[fol. 193a] verse to hold that the suggested exceptions here apply to support firm liability.

In this situation the S. E. C. has not yet afforded us its accustomed assistance. In the *Rattner* case its general counsel filed a brief *amicus curiae* wherein it first urged that the statute in terms was to be construed as I have stated above and much of the reasoning I have employed was there adduced in support of its view. Then it undermined its own opinion by urging that it had freed the defendants of liability by adopting its Rule X-16A-3(b) requiring a partner to file a report to it "only as to that amount of such equity security which represents his proportionate interest in the partnership," and that the defendants were justified in assuming the Commission to hold the other partners not liable here. The court in the *Rattner* case rejected this argument, saying: "The Commission may exempt 'transactions'; but it cannot reduce the

liability imposed by section 16(b)." *Rattner* v. *Lehman, supra,* 2 Cir., 193 F. 2d 564, 566. That the Commission had its doubts at least as to the policy of its rule is shown by the following statement in its *Rattner* brief: "For reasons summarized below the Commission now has substantial doubt as to whether Rule X-16A-3 fully effectuates the statutory purpose of Section 16. It is therefore currently considering amending the rule to limit the broad exemption now implicit in it."

At any rate the Commission soon (1953) amended its rule to require a partner to report the entire amount of the security owned by the partnership, Rule X-16A-8(g), adopted by Sec. Ex. Act Rel. 4801 (1953), now 17 CFR (1960 Supp.) §240.16a-3(b). Loss, Securities Regulation 585-587 (1955 Supp.). And there the matter now stands, with the Commission at odds with our interpretation.

The matter of the validity of such a Commission regulation is obviously still an open one. We expressed doubt as [fol. 194a] to another rule in *Greene* v. *Dietz,* 2 Cir., 247 F. 2d 689, which was thereafter held invalid in *Perlman* v. *Timberlake,* D. C. S. D. N. Y., 172 F. Supp. 246; but the contrary was held in *Continental Oil Co.* v. *Perlitz,* D. C. S. D. Tex., 176 F. Supp. 219. Seemingly the Commission still relies on its power under the statute. See Timbers, *Management Compensation Plans: SEC Problems,* Proceedings of the Second Annual Institute on Corporate Counsel, April 21, 22, 1960 (Fordham Univ. Press) 28, 37-38; Meeker & Cooney, *The Problem of Definition in Determining Insider Liabilities Under Section 16(b),* 45 Va. L. Rev. 949, 957 (1959); Cook & Feldman, *Insider Trading under the Securities Exchange Act,* 66 Harv. L. Rev. 385, 612, 632-635 (1953); Loss, Securities Regulation 578 (1951). This is an obvious state of confusion and uncertainty which is unfortunate to the public, the investors, and their traders. I do not believe any inference can be drawn from the failure of Congress to act to correct the *Rattner* decision; that body has lately been interested in other matters more immediately troublesome than that of the regulation of private investments and the S. E. C. obviously has not given it positive leadership. So it would seem to me that at least before

we dispose of this vastly important issue we should ask the S. E. C. for its informed comments.

I should add that I agree with the method of computation, finding a "purchase" under §16(b) and a total profit to the firm of $98,686.77, which Judge Dawson followed and Judge Medina approves in his opinion. But this computation, upon which we all agree, highlights the anomaly of the ultimate conclusions reached by my brothers. For they are forced to concede that insider profits were made and that there must be restitution to the corporation, but then they differ widely as to how much is to be restored. It seems to me that neither of their results can be justified logically or legally under any principles of the law of [fol. 195a] partnership with which I am familiar. I submit that if there were insider profits (as their concession shows) then the partnership and the individual partners must be held liable to return these profits in full to TideWater. And that should be our decision. The final anomaly in our exceptional treatment of this case is the denial of all interest for the use of the sums found due the corporation, contrary to our uniform practice in other cases. *Magida* v. *Continental Can Co.*, 2 Cir., 231 F. 2d 843, 848, certiorari denied *Continental Can Co.* v. *Magida*, 351 U. S. 972; *Blau* v. *Mission Corp.*, 2 Cir., 212 F. 2d 77, 82, certiorari denied *Mission Corp.* v. *Blau*, 347 U. S. 1016; *Park & Tilford* v. *Schulte*, 2 Cir., 160 F. 2d 984, 988, 989, certiorari denied *Schulte* v. *Park & Tilford*, 332 U. S. 761. If there are special equities here, they have not been stated.

I would reverse and remand for the entry of a judgment returning to the TideWater corporation all the profits made from the transaction by the defendants, together with interest and costs.

[fol. 196a]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. Thomas W. Swan, Hon. Charles E. Clark, Hon. Harold R. Medina, Circuit Judges.

ISADORE BLAU, a Stockholder of Tide Water Associated Oil Company, Plaintiff-Appellant,

v.

ROBERT LEHMAN, et al., Defendants-Appellees,

and

JOSEPH A. THOMAS, Defendant-Appellant,
TIDEWATER ASSOCIATED OIL COMPANY, Defendant.

JUDGMENT—December 20, 1960

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is Affirmed.

A. Daniel Fusaro, Clerk.

[fol. 197a] [File endorsement omitted]

[fol. 204a]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 25846

ISADORE BLAU,

v.

ROBERT LEHMAN, et al.

NOTICE OF MOTION—Filed February 21, 1961

To:

Morris J. Levy, Esq., 261 Broadway, New York 7, New York.

Simpson Thacher & Bartlett, 120 Broadway, New York 5, New York.

Please take notice that the attached motion of the Securities and Exchange Commission for leave to participate *amicus curiae* and to file a petition for rehearing is returnable on Monday, January 9, 1961 at the United States Court House, Foley Square, New York, New York at 10:30 A.M. or as soon thereafter as counsel can be heard.

Walter P. North, General Counsel, Securities and Exchange Commission, Washington 25, D.C.

January 3, 1961

[fol. 205a]

MOTION OF THE SECURITIES AND EXCHANGE COMMISSION FOR LEAVE TO PARTICIPATE AMICUS CURIAE AND TO FILE A PETITION FOR REHEARING—Filed February 21, 1961

To the Honorable Judges of Said Court:

The Securities and Exchange Commission respectfully moves this Court for leave to participate *amicus curiae* and to file the attached petition for rehearing for reasons stated in the attached petition.

Walter P. North, General Counsel, Securities and Exchange Commission, Washington 5, D. C.

January 3, 1961

[fol. 206a]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 25846

ISADORE BLAU,

v.

ROBERT LEHMAN, et al.

On Appeal From a Judgment of the United States District Court for the Southern District of New York

PETITION OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE, FOR REHEARING—Filed February 21, 1961

To the Honorable Judges of This Court:

The Securities and Exchange Commission respectfully petitions this Court for rehearing, perhaps en banc, of its decision herein dated December 20, 1960, so as to permit the Commission to urge that this Court in its decision should overrule its earlier interpretation of Section 16(b) of the Securities Exchange Act of 1934 as enunciated in *Rattner v. Lehman*, 197 F. 2d 564.

1. The decision of this Court involves an important interpretation of Section 16(b) of the Securities Exchange Act of 1934, and, as indicated in the dissenting opinion, the views of the Commission might be helpful to this Court.

2. Although we were aware of the pendency of these proceedings prior to the issuance of this Court's decision, it appeared to us that the case would turn on factual disputes rather than on a legal interpretation of the statute and for that reason the Commission did not request permission to appear *amicus curiae* at an earlier date.

[fol. 207a] Should rehearing be granted the Commission undertakes to file a memorandum of its views within ten days of the granting of the petition.

Respectfully submitted,

Walter P. North, General Counsel, Securities and Exchange Commission, Washington 25, D.C.

January 3, 1961

Motion for leave to participate as amicus curiae and to file petition for rehearing is denied.

TWS, HRM.

I dissent and vote for a rehearing in banc.

C.E.C.

[File endorsement omitted]

[fol. 209a]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 25846

ISADORE BLAU, a stockholder of Tide Water Associated Oil Company, suing on behalf of himself and all other stockholders similarly situated and on behalf of and in the right of Tide Water Associated Oil Company, Plaintiff-Appellant-Appellee,

—against—

ROBERT LEHMAN, ALLAN S. LEHMAN, JOHN HERTZ, JOHN M. HANCOCK, MONROE C. GUTMAN, PAUL M. MAZUR, WILLIAM J. HAMMERSLOUGH, FRANCIS A. CALLERY, FREDERICK L. EHRMAN, JOHN R. FELL, WILLIAM S. GLAZIER, PHILIP H. ISLES, HERMAN H. KAHN, EDWIN L. KENNEDY, FRANK J. MANHEIM, PAUL E. MANHEIM, MORRIS NATELSON, HAROLD J. SZOLD and JOSEPH A. THOMAS, a co-partnership, doing business under the firm name and style of LEHMAN BROTHERS, Defendants-Appellees,

JOSEPH A. THOMAS, Defendant-Appellee-Appellant,

and

TIDE WATER ASSOCIATED OIL COMPANY, Defendant-Appellee.

AFFIDAVIT ON BEHALF OF ISADORE BLAU, PLAINTIFF-APPELLANT APPELLEE, IN SUPPORT OF THE MOTION BY THE SECURITIES EXCHANGE COMMISSION FOR LEAVE TO APPEAR AS AMICUS CURIAE AND FOR LEAVE TO FILE PETITION FOR REHEARING—Filed February 21, 1961

State of New York,
County of New York, ss.:

Morris J. Levy, being duly sworn, deposes and says:

I am the attorney for Isadore Blau, Plaintiff-Appellant-Appellee herein, and make this affidavit in support of the motion by the Securities Exchange Commission for leave to appear as *Amicus Curiae* and for leave to file its Petition for a Re-Hearing *en banc*.

Although the Securities and Exchange Commission has been ordained by the Congress to administer the Securities [fol. 210a] Exchange Act of 1934, this Court was not afforded the opportunity of being advised upon the argument of this Appeal concerning the Commission's views with respect to important legal problems within its particular field of expertise.

For reasons best known to itself, the Commission did not participate in the arguments before this Court.

In view of the importance to the general public of the legal issues here involved and the adjudication thereof by this Court, the Commission has now asked for leave to appear as *amicus curiae* and for leave to file its Petition for a re-hearing before this Court "*perhaps en banc*"

Since it has been held that an Administrator's views with respect to the Statute it administrates is "entitled to great weight"—I respectfully urge this Court to grant its application for a re-hearing so that all the aspects of the important legal issues may be explored.

Morris J. Levy

Sworn to before me this 9th day of January, 1961.

Marvin Zuckerberg, Notary Public, State of New York [balance illegible].

[fol. 211a] [File endorsement omitted]

[fol. 220a]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 51—October Term, 1960

(Motion submitted January 9, 1961

Decided February 21, 1961)

Docket No. 25846

ISADORE BLAU, a stockholder of Tide Water Associated Oil Company, suing on behalf of himself and all other stockholders similarly situated and on behalf of and in the right of Tide Water Associated Oil Company, Plaintiff-Appellant-Appellee,

ROBERT LEHMAN, ALLAN S. LEHMAN, JOHN HERTZ, JOHN M. HANCOCK, MONROE C. GUTMAN, PAUL M. MAZUR, WILLIAM J. HAMMERSLOUGH, FRANCIS A. CALLERY, FREDERICK L. EHRMAN, JOHN R. FELL, WILLIAM S. GLAZIER, PHILIP H. ISLES, HERMAN H. KAHN, EDWIN L. KENNEDY, FRANK J. MANHEIM, PAUL E. MANHEIM, MORRIS NATELSON, HAROLD J. SZOLD and JOSEPH A. THOMAS, a co-partnership, doing business under the firm name and style of LEHMAN BROTHERS, Defendants-Appellees,

JOSEPH A. THOMAS, Defendant-Appellee-Appellant,

and

TIDE WATER ASSOCIATED OIL COMPANY, Defendant-Appellee.

[fol. 221a]

Motion for Leave to Participate as Amicus Curiae and to File Petition for Rehearing

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Walter P. North, General Counsel, Securities & Exchange Commission, Washington, D. C., for Securities & Exchange Commission.

Motion for leave to participate as *amicus curiae* and to file petition for rehearing is denied.

T. W. S., H. R. M., *U.S.C.JJ.*

I dissent and vote for a rehearing *in banc*.

C. E. C., *U.S.C.J.*

Petition for Rehearing in Banc

The active judges, having voted to deny the petition for rehearing *in banc*, except Judges Clark and Smith who dissent and vote to grant the petition, the petition is denied.

J. Edward Lumbard, *Chief Judge*.

February 21, 1961

CLARK, *Circuit Judge* (dissenting):

The court's refusal by majority vote to take any steps to abate the confusion resulting from the decision by our senior panel has striking connotations beyond those affecting the central issue on the merits, important as that is. Chief among these added consequences is the precedent—[fol. 222a] the first time in our history—of refusing the assistance of the Securities and Exchange Commission, here proffered as a result of the need therefor expressed by the writer as a member of the court. This re-enforces the harsh refusal of the original panel majority. Under the peculiar circumstances here present making S. E. C. advice more relevant even than usual, I should have thought that we would have accepted the offer with alacrity, whatever our eventual views as to the merits; and I am chagrined that an individual judge's "right to know" is thus so severely circumscribed. Some instances where such help has been gladly received, as well as others where its absence is deplored, are noted in *Greene* v. *Dietz*, 2 Cir., 247 F. 2d 689, 696. Even in the case which is being treated as controlling here, *Rattner* v. *Lehman*, 2 Cir., 193 F. 2d 564, the court, although rejecting the Commission's advice in part, nevertheless paid it the compliment of devoting a major part of its discussion

to the Commission's presentation. I submit with deference that the correct approach here was that followed in *Greene* v. *Dietz, supra,* 2 Cir., 247 F. 2d 689, 697:

> "Although neither appellant nor appellee sought a rehearing in this case, the Securities and Exchange Commission timely filed an application with us seeking our permission to file a petition, amicus curiae, for a rehearing. *We readily granted such permission.* [Emphasis added.] The Commission represents to us that our opinion of June 7, 1957 should be clarified * * *. We are grateful to the Commission for the interest it has shown, and we order that the brief offered by it in support of its petition be filed and made a part of the records in the case."

In my original dissent I pointed out why S. E. C. advice seemed particularly desirable here. In addition to the [fol. 223a] expertise which the Commission and its staff must necessarily have acquired over the years in an area particularly committed to its care, there were the special considerations that the Commission has long required reporting by trading partnerships of all insider short-swing profits acquired by them and hence must know the dimensions of the problem and further that the Commission had made changes in its regulations signifying lack of confidence in the *Rattner* rule, the rationale for which changes surely would be enlightening. Now the reasons presently stated by the Commission for its appearance intensify this need for enlightenment. For it requests granting of its petition for rehearing "so as to permit the Commission to urge that this Court in its decision should overrule its earlier interpretation of Section 16(b) of the Securities Exchange Act of 1934 as enunciated in *Rattner* v. *Lehman,* 193 F. 2d 564." An explanation of its reasons for coming to its present conclusion could hardly fail to be instructive.

My brothers offer no explanation of their decision, and the grounds therefor can only be inferred. But since a decision on the merits is avoided in a situation where the need therefor is great, it is probably a fair inference that procedural barriers were thought to exist. It is believed,

however, that actually none such are discoverable. As concerns the S. E. C. it has followed the exact procedure found acceptable in *Greene* v. *Dietz, supra*, 2 Cir., 247 F. 2d 689. The Commission states that it refrained from seeking to enter earlier because of its conclusion that the case here would turn on issues of fact—a very reasonable deduction, since *Rattner* had assumed to settle the law. Undoubtedly, too, rejection of its views in the *Rattner* case obviously suggested caution until it received something approaching an invitation from members of the court. And if we are at all realistic we must recognize that changes in Commission [fol. 224a] personnel may well have resulted in a new and different policy.

The S. E. C. application is now supported by the plaintiff. Here, too, there seems to be some implication that he has been dilatory. But I do not see how this can be sustained. Notwithstanding the two long holiday week ends immediately after our decision he moved with due promptness, and within the 15 days stated in our Local Rule 25(a), for certification of the case to the Supreme Court. While this may not have been good tactics in view of our customary unwillingness to certify, yet it does show his desire and speedy attempt to secure some form of review. Upon denial of his motion by a divided court and the intervening application by the S. E. C., he promptly filed his motion and affidavit supporting the request of the S. E. C. to be heard *in banc*. Thus at no time has our decision become final, and it will not become so until the filing of the present order. Obviously there has been no prejudice to anyone by any supposed delay. Moreover, it has been our uniform practice to grant additional time for presentation of petitions for rehearing, since we have preferred to terminate the process of adjudication by decisions on the merits rather than by application of some newly fashioned time barriers. Indeed I can recall no case where we have ever rejected a meritorious petition for rehearing on the ground that it was untimely. The fashioning of procedural rules *ad hoc* to avoid decision on the merits is always to be deplored. Clark, Code Pleading 71 (2d Ed. 1947).

I am bound to add that I consider all these implications of procedural barriers irrelevant; for even if these suitors

could have been considered in default as private claimants, yet we must not overlook the fiduciary character in which they here appear. Both the Commission and the plaintiff are trustees of the public interest; their private interest is either nominal or, in the case of the Commission, non-[fol. 225a] existent. At best they do but remind us of our own public responsibility. In such case I doubt if a few days' delay in the holiday season can properly be seized upon by us as justifying our inaction in the public regard. Consideration on the merits, far from according succor to the laggard, would be but a proper response to a judicial obligation to do justice to all, however incompletely represented.

But, whatever the reasons to be assigned for the result, it leaves this important area of the law almost ludicrously uncertain. What now is the present force to be assigned to *Rattner*? Although it is assumed to compel the present decision, yet quite significantly not a single word in its defense has been uttered by any of the eight judges here engaged. My own criticisms uttered in my dissent have remained unanswered and have now, as is apparent, the support of the S. E. C. But even further, Judge Medina, in writing the main opinion and though he held himself bound by the decision, uttered as strong a criticism of its results as has appeared, in supporting the fundamentally inconsistent ruling that the partner-director must give up something representing his share of insider profits to the corporation. And in this Judge Swan concurred, although agreeing neither on the principle nor on the actual amount of the recovery. It is indeed ironical that so disfavored a precedent[1] nevertheless has apparent power to control even to the extent of ruling out proper restrictions or exceptions there at least implied with respect to a director who gives actual investment advice.

The most serious vice of the *Rattner* decision is the unfair discrimination it builds into an important remedial

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[1] It has remained uncited elsewhere except for one purely incidental reference in *Lehman* v. *Civil Aeronautics Board*, D. C. Cir., 209 F. 2d 289, 294, n. 9, certiorari denied 347 U. S. 916.

statute—a discrimination substantially eliminating the great Wall Street trading firms from the statute's operation. [fol. 226a] So great is the unfairness of the result that, notwithstanding its remedial nature, the statute, it would appear, should not stand unless its judicially discovered defects can be corrected. But before that conclusion is finally reached let us hope that the S. E. C. may discover some tribunal prepared and willing to listen to its arguments.

SMITH, *Circuit Judge*:

I join in the dissent of Clark, *C.J.*

[fol. 227a]

IN UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Present: Hon. Thomas W. Swan, Hon. Charles E. Clark, Hon. Harold R. Medina, Circuit Judges.

ISADORE BLAU, a Stockholder of Tide Water Associated Oil Company, Plaintiff-Appellant,

v.

ROBERT LEHMAN, et al., Defendants-Appellees,

and

JOHN A. THOMAS, Defendant-Appellant,

TIDEWATER ASSOCIATED OIL COMPANY, Defendant.

ORDER DENYING MOTION OF THE SECURITIES AND EXCHANGE COMMISSION FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE AND TO FILE A PETITION FOR REHEARING—February 21, 1961

A motion having been made herein by counsel for the Securities and Exchange Commission for leave to participate as amicus curiae and to file a petition for rehearing,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

[fol. 228a] [File endorsement omitted]

[fol. 229a]

IN UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Charles E. Clark, Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Hon. Henry J. Friendly, Hon. J. Joseph Smith, Circuit Judges.

ISADORE BLAU, a stockholder of Tide Water Associated Oil Company, suing on behalf of himself and all other stockholders similarly situated and on behalf of and in the right of Tide Water Associated Oil Company, Plaintiff-Appellant-Appellee,

v.

ROBERT LEHMAN, ALLAN S. LEHMAN, JOHN HERTZ, JOHN M. HANCOCK, MONROE C. GUTMAN, PAUL M. MAZUR, WILLIAM J. HAMMERSLOUGH, FRANCIS A. CALLERY, FREDERICK L. EHRMAN, JOHN R. FELL, WILLIAM S. GLAZIER, PHILIP H. ISLES, HERMAN H. KAHN, EDWIN L. KENNEDY, FRANK J. MANHEIM, PAUL E. MANHEIM, MORRIS NATELSON, HAROLD J. SZOLD and JOSEPH A. THOMAS, a co-partnership, doing business under the firm name and style of LEHMAN BROTHERS, Defendants-Appellees,

JOSEPH A. THOMAS, Defendant-Appellee-Appellant,

and

TIDE WATER ASSOCIATED OIL COMPANY, Defendant-Appellee.

ORDER DENYING PETITION FOR REHEARING IN BANC —February 21, 1961

A petition for rehearing in banc having been taken under advisement,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

[fol. 230a] [File endorsement omitted]

[fol. 231a] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 232a]

SUPREME COURT OF THE UNITED STATES

No. 810, October Term, 1960

ISADORE BLAU, etc., Petitioner,

vs.

ROBERT LEHMAN, et al.

ORDER ALLOWING CERTIORARI—April 24, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.